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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-347

ORECK CORPORATION, *Petitioner*

v.

WHIRLPOOL CORPORATION,

and

SEARS, ROEBUCK & COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Oreck Corporation petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on May 1, 1978.

OPINIONS BELOW

The opinion of the court of appeals on Rehearing *en banc* from which this petition is taken (including the dissent of Judges Mansfield and Feinberg) is reported at Trade Cas. 1978-1 ¶ 62,026. The prior court of appeals panel decision (including the dissent of

Judge Mansfield) is reported at 563 F.2d 54. Copies of the opinions below are reprinted in the appendix.[1]

JURISDICTION

The court of appeals entered judgment on May 1, 1978. On July 17, 1978, Mr. Justice Marshall extended the time to petition for certiorari to and including August 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the rule that boycotts are illegal *per se* is properly applied to a vertical agreement resulting in a manufacturer's refusal to sell, in a situation where such agreement is not ancillary to an exclusive distributorship or to any other valid marketing goal suggested by this Court as possible justification for vertical restrictions.

2. Whether the district court's charge to the jury was proper in the context of the issues and record evidence in this case. More specifically, whether the court of appeals erred in overturning a jury verdict, which had found defendants Whirlpool and Sears liable for conspiring to exclude Oreck from selling "Whirlpool" vacuum cleaners, because of a failure to charge the jury regarding possible reasonableness, where

(a) no evidence had been presented purporting to justify a Sears-Whirlpool agreement on the basis of a

[1] The appendix is cited as "Pet. App.". Proceedings below cited in the Joint Appendix to the Second Circuit are cited as "J.A.". Trial transcript passages are cited as "Tr."; plaintiff's trial exhibits are identified as "PX" and are cited to their location in the Book of Exhibits as "E".

legitimate business need to eliminate intrabrand competition in Whirlpool vacuum cleaners;

(b) no benefit to interbrand competition was claimed;

(c) the only defense offered was that Whirlpool had acted unilaterally to terminate Oreck without any pressure or communication from Sears, or any agreement with it; and

(d) no objection was made to the charge as given.

3. Whether the court of appeals erred in holding that defendants' concerted exclusionary conduct could be defensible on the ground that (a) plaintiff had failed to show "an anti-competitive effect in the vacuum cleaner industry as a whole", and (b) defendant Whirlpool had exercised a contractual right to terminate plaintiff.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

STATEMENT

A. The Oreck-Whirlpool Arrangement

Whirlpool Corporation ("Whirlpool") manufactures a variety of household products, including vacuum cleaners since its 1957 acquisition of the Birtman Electric Company. Birtman had manufactured cleaners for Sears, Roebuck & Company ("Sears"), and

Whirlpool continued to do so under the Sears "Kenmore" brand. It also sold under the Whirlpool label, using its already-established distribution system. These latter efforts proved unsuccessful and in 1961, Whirlpool discontinued sales under its own label.

During the 1958 to 1961 period, David Oreck, as Executive Vice President of Bruno, New York, had headed the sales operations of the most successful of the Whirlpool brand vacuum cleaner distributors. (J.A. 50-52, 55, 466-67). When Whirlpool decided to reestablish the marketing of Whirlpool brand vacuum cleaners, it determined to do so through a different method of distribution, that of an exclusive national distributor. It asked David Oreck to be that distributor, and the Oreck Corporation ("Oreck") was appointed as the exclusive United States distributor for Whirlpool brand vacuum cleaners in August, 1963. (J.A. 56-68, 467-71; PX 3, E 1-9).

Oreck's original contract with Whirlpool was for a five year term with automatic one year extensions thereafter, unless six months prior notice of termination was given. In 1967, Oreck switched its marketing technique and began selling through direct mail solicitation, with a resultant increase in sales from 8,384 units in 1967, to 15,610 units in 1968, and to 78,203 units in 1971. (PX 106, E 102). The new sales technique initiated by Oreck displeased Sears, as is discussed below (pp. 6-7), and on June 17, 1968, Whirlpool notified Oreck that it was terminating the contract. After negotiations, including a threat to sue by Oreck, a new contract was entered into on August 1, 1968, extending Oreck's distributorship until December 31, 1971, at which time Whirlpool terminated Oreck, notwithstanding the five-fold increase in Oreck's sales that occurred between 1968 and 1971.

This action was filed by Oreck in September, 1972. Count I, charging a conspiracy between Whirlpool and Sears to exclude Oreck from the United States market, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, is the pertinent portion of the complaint for purposes of this petition. The jury found for Oreck on Counts I and II and on July 13, 1976, judgment was entered in favor of Oreck in the amount of $2,250,000.[2]

B. The Sears-Whirlpool Relationship

The jury finding of a conspiracy between Whirlpool and Sears was based on substantial evidence. An intimate relationship has existed between Sears and Whirlpool for over fifty years and Sears buys approximately two-thirds of Whirlpool's annual production. (J.A. 340-42). A series of Sears officers have sat on

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[2] Count II charged a conspiracy to exclude Oreck from the Canadian market. The jury allocated its damage award 90% to Count I and 10% to Count II. The jury charge for Count II was in keeping with the then authoritative *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). Because of the subsequent overruling of *Schwinn*, this charge was incorrect and Oreck does not seek review of the court of appeals' order of a new trial on Count II.

Contrary to the view of the court of appeals (Pet. App. 31a n. 4), however, the error with respect to Count II does not affect the validity of the 90% of the judgment relating to the domestic market. The problem with the charge respecting the Canadian market was that it allowed recovery for unilaterally-imposed restrictions; but no similar issue was raised as to the domestic claims, and the reversal does not undermine the judgment on such claims in any way. Insofar as the evidence regarding Canada showed a combination of Whirlpool and Sears to injure Oreck, it was properly considered by the jury. As we will show, the defense was that Whirlpool acted entirely on its own in terminating Oreck, without any pressure, complaint, communication from, or agreement with, Sears. Evidence contradicting that defense was material and relevant and not improper prejudice. (See dissent, Pet. App. 43a n. 1).

Whirlpool's board or become officers of Whirlpool and Sears is a large Whirlpool shareholder. (J.A. 322-23, 333-36). In addition, officials of the two companies meet to discuss marketing and sales plans. At one such 1971 meeting, future plans for vacuum cleaners, to be effected after Oreck's termination, were discussed. (J.A. 571-74, 883-84).

Because of contacts such as these, Whirlpool knew of Sears' strong interest in how Whirlpool made its non-Sears sales. A Whirlpool internal memorandum written in 1961 states that "Sears becomes very unhappy if RCA WHIRLPOOL product is retailed for less than the Sears product manufactured by Whirlpool", facing Whirlpool with the challenge of selling "cleaners in volume at high retail prices." (PX 160; E 127, 141). Whirlpool made it clear to Oreck from the outset that Oreck was not to offer low-priced merchandise. (J.A. 73-75; PX 45, E 39-40).

Oreck found, however, that it could not compete with Sears in the higher-priced line and in 1967 shifted its method of distribution to sell a lower-priced cleaner, primarily by direct mail. Oreck's mail order campaign proved successful; its sales increased dramatically, as mentioned above; and, consequently, it was able to provide more effective competition to Sears. (J.A. 200-12, 303-13).

C. Evidence of a Conspiracy

Sears' reaction to Oreck's burgeoning competition was to attempt to suppress it. As early as 1967, John Payne, the Whirlpool employee in most frequent direct contact with Oreck (J.A. 105, 544, 577, 857-58) told David Oreck not to "rock the boat" and to terminate the mail order business because the "other customer"

did not like it. (J.A. 207). Two other Whirlpool officials also told Oreck that selling by mail order was a "mistake." (J.A. 501, 505). When Oreck's original contract was terminated the following year, Payne told David Oreck:

> Dave, I hesitate to tell you this because it could cost me my job, but I think our other customer got to the head of the company. (J.A. 175)

Sears' dislike of Oreck's mail order business is also shown by a complaint about Oreck's mail order solicitation from J. M. Barker, "an Honorary Director of Sears" (J.A. 330), which was forwarded to Whirlpool by Sid Boyar, who was both a Sears vice president and director and a Whirlpool director. (J.A. 335, 828-31). Boyar's communication was sent on by Don Ranum, of Whirlpool, to Whirlpool president, John Platts. (PX 60, E 53, 54). Another indication that Whirlpool sought to prevent Oreck from competing with Sears in the mail order business is Whirlpool's refusal to create a mailing package satisfying parcel post and UPS requirements. (J.A. 601-02, 610). John Payne had originally told Oreck that there would be no problem doing this, (J.A. 604) but later advised Marshall Oreck that

> [Corporate said] they are not interested in providing you with a carton and it's in your best interest leaving this matter alone. It's sensitive with Corporate and do not make any changes leave this matter alone. (J.A. 609)

Two other incidents also demonstrate the existence of a Sears-Whirlpool conspiracy to restrain competition from Oreck. When Oreck desired to distribute Whirlpool vacuum cleaners in Canada, Whirlpool declined to obtain Canadian Standard Association

(CSA) approval for the Oreck unit or to make minor design changes necessary to meet CSA standards. (J.A. 130-33, 151, 353, 387). John Payne, who had encouraged Oreck in its interest in marketing in Canada, admitted that his superior at Whirlpool told him not to make the changes necessary for CSA approval. (J.A. 354, 362-63). In an April 15, 1970 telegram to David Oreck, Payne expressed regret that "I am unable to obtain a waiver to the current franchise to permit Canadian marketing." (J.A. 356-57, PX 34, E 22). Whirlpool sold vacuum cleaners in Canada to Simpson-Sears Ltd., an affiliate of Sears which marketed cleaners competitive to that sold by Oreck, and for which Whirlpool had obtained CSA approval. (J.A. 134-35, 538-39, 562-63).

Oreck also several times asked Payne to make vacuum cleaners for private label customers (J.A. 257-58, 264, 634-35; PX 78-79, 81, E 84-49) and Payne initially was enthusiastic about the idea. (J.A. 626). However, Payne later advised Marshall Oreck that "Corporate had decided . . . not to make a private label for us" (J.A. 629) and in response to a later request from David Oreck to make a private label vacuum cleaner, Payne responded,

> Dave, I want to tell you as a friend, don't rock the boat. We have objections here from our customer about giving you private label and if you persist on asking this, it's only going to cause you trouble. (J.A. 263)

Oreck persisted in its attempts to have private label vacuum cleaners made by Whirlpool until September 1971, when Payne told Marshall Oreck that "another vacuum cleaner customer" told Whirlpool "they are not interested in having another competitor in the

vacuum cleaner business." (J.A. 637-38). Despite the close involvement of John Payne with Oreck, defendants did not call him as a witness, although Payne was present in the court room. (Tr. 1648).

Additional evidence from which the jury could have inferred a conspiracy was Whirlpool's economically irrational termination of Oreck in 1971, Oreck's most successful year, and the admission of Whirlpool officials that Oreck was "doing a nice job, no question about that" (J.A. 552) and "we had no quarrel with the amounts he was selling". (J.A. 488). This seemingly irrational behavior continued even after Oreck's termination, when in 1972, Whirlpool refused to sell Oreck 30,000 units in inventory on a cash basis at a full unit price of $30. (J.A. 298-99, 491-92, 495-96, 518, 521-22, 544-46). Instead, it sold them to third parties at only $15.00 per unit (J.A. 546, 555-56), or a total of approximately $450,000 less than Whirlpool could have realized from a sale to Oreck.

D. Proceedings in the Court of Appeals

The judgment entered for Oreck in the district court was overturned, two to one, by a three-judge panel in the court of appeals for the Second Circuit, 563 F.2d 54, and the case remanded for a new trial. On rehearing *en banc,* the panel majority's decision was affirmed, six to two. Trade Cas. 1978-1 ¶ 62,026.

The majority held that the trial judge's charge to the jury invoked a *per se* standard under which "the jury could simply have found an agreement by Sears and Whirlpool to exclude Oreck from the sale of Whirlpool vacuum cleaners and *on that basis* have found them guilty . . . of a *per se* violation of § 1 of the Sherman Act" (Pet. App. 30a-31a, court's

emphasis). The issue, as framed by the majority, was "whether the *per se* standard . . . was appropriate in light of the nature of the alleged Whirlpool/Sears agreement" (Pet. App. 32a). Relying on this court's decision in *Continental T.V.* v. *G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977), the majority held that vertical boycott agreements, unlike horizontal restraints, must be "examined under the *rule of reason* standard," since they "promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products" (Pet. App. 35a). In addition, finding that "Whirlpool's decision not to renew Oreck's distributorship was an exercise of its contractual rights" (Pet. App. 39a), the majority further held that "[a]ny alleged inducements by Sears to Whirlpool to allow the contract with Oreck to expire" would not violate the antitrust laws "without some further showing that . . . there was an anticompetitive effect in the vacuum cleaner industry as a whole . . ." (Pet. App. 39a-40a).

Judges Mansfield and Feinberg, in dissent, accepted "the legal issue as framed by the majority" (Pet. App. 49a), but would have affirmed under decisions of this Court holding that an "agreement to boycott is sufficiently pernicious in its purpose and effect to be unreasonable *per se* . . ." (*Id.*). In so holding, the dissent noted that "the existence of a contract right to terminate Oreck does not create a mantle of protection against an anticompetitive agreement" (Pet. App. 52a); and it held the majority's "heavy reliance on *Continental T.V.*" to be misplaced both because this case "involves a boycott, not a vertical restriction" and because there had been no showing here that elimination of Oreck's intra-

brand competition had resulted in any "countervailing stimulation of interbrand competition, the usual saving grace of a vertical restraint." (Pet. App. 54a-55a).

REASONS FOR GRANTING THE WRIT

This case presents questions of fundamental importance under the antitrust laws. Most sharply raised is the issue that divided the court of appeals: whether a vertical boycott agreement is illegal *per se* or must be tested by the rule of reason under this Court's 1977 *Continental T.V.* decision, in a situation where the agreement was not ancillary to an exclusive distributorship or other valid marketing goal, and no benefit to interbrand competition was even claimed. Review by this Court is called for both to correct the error below and to make clear that, in these circumstances, a boycott agreement is subject to the *per se* rule established by this Court's group boycott decisions, whether vertical or horizontal. The need for such review is particularly urgent because of the influence an *en banc* decision of the Court of Appeals for the Second Circuit will inevitably have both within and outside that Circuit.[3]

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[3] A leading commentator has noted that the "*Oreck* case has generated much controversy and discussion at each level of litigation." Von Kalinowski, *Antitrust Report*, July 1978, at 18. While finding the dissent's argument "most persuasive," Von Kalinowski observed that "ultimately the Supreme Court must resolve the issue . . ." raised by the majority and dissenting opinions below (*Id.*). The panel or *en banc* decision in *Oreck* has already been cited in at least five antitrust cases: *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 1978-1 Trade Cas. ¶ 62,064 (3rd Cir. 1978); *Bernard* v. *Curtis Circulation*, 1978-2 Trade Cas. ¶ 62,141 (E.D.N.Y. 1978); *All Label Record Service, Inc.* v. *Mr. Wiggs Dept. Stores*, 1978-1 Trade Cas. ¶ 62,073 (N.D. Ohio 1978); *Fuchs Sugars & Syrups, Inc.* v. *Amstar Corp.*, 447

The decision below set aside a jury verdict in favor of Oreck on the ground that the charge to the jury presented an improper *per se* theory of liability—a contention not urged by the defense at trial.[4] In so holding, the majority misconceived the applicable law on group boycotts and vertical restraints and erroneously read *Continental T.V.* as countenancing a rule of reason defense for vertical boycott agreements that eliminate intrabrand competition without even an iota of countervailing benefit to interbrand competition. The majority further erred in relying on the existence of a supposed contractual right to terminate, irrelevant when antitrust violation is involved, and an ostensible requirement of general market effect, or "public injury," which this court rejected in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

1. Boycotts, or concerted refusals to deal, "have long been held to be in the forbidden category" of *per se* illegal restraints under the Sherman Act. *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *United States* v. *General Motors Corp.*, 384 U.S. 127, 146 (1966); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 347-48 (1963).[5] The majority

F. Supp. 867 (S.D.N.Y. 1978); and *Petroleum for Contractors, Inc.* v. *Mobil Oil Corp.*, No. 77 Civ. 3079 (S.D.N.Y., filed July 5, 1978).

[4] To the contrary, in a colloquy quoted in Judge Mansfield's dissent (Pet. App. 21a), defense counsel conceded that it was a "correct statement of the law" to instruct the jury that if it "finds that we had a conspiracy for the purpose of getting rid of Oreck, that is an unreasonable restraint of trade." (Tr. 1660).

[5] *Cf. FMC* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250 (1968); *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 214 (1951); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600 (1914).

below found the present case distinguishable on the ground that it involved a *vertical* combination. (Pet. App. 34a-35a). But the *per se* prohibition of boycotts is not limited to horizontal arrangements. A leading commentator on boycotts has declared that "the essential combination may be horizontal or vertical,"[6] and Professor Bork has analyzed the proper dichotomy as being between "naked boycotts," which are *per se* illegal, and "ancillary boycotts" which are lawful when reasonably related to a cooperative endeavor that enhances efficiency. This dichotomy applies without regard to whether the combinations at issue are vertical or horizontal.[7]

Indeed, one of the leading cases in this Court expounding the *per se* boycott rule, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, involved vertical agreements, be-

[6] Barber, "Refusals to Deal Under the Antitrust Laws", 103 U. Pa. L. Rev. 847, 875 (1955), cited with approval by this court in *United States* v. *General Motors Corp.*, *supra*, at 146-47; *see also*, Sullivan, *Antitrust*, 231 n. 1 (1977) ["But it is conceivable that only a single firm at the blockaded level may succeed in coercing or inducing suppliers or customers (or, for that matter, one important supplier or customer) from dealing with one or more would-be competitor of the perpetrator. Such an arrangement would display all essential elements of a boycott."].

[7] As Professor Bork notes, the naked-ancillary dichotomy was first enunciated in the leading decision of *Addyston Pipe & Steel Co.* v. *United States*, 85 Fed. 271, 276 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Bork, *The Antitrust Paradox*, at 26-30 (1978). *See also Silver* v. *New York Stock Exchange*, 373 U.S. 341, 348-49 (1963), which held that the action there challenged would be a boycott illegal *per se*, "absent any justification derived from the policy of another statute or otherwise. . . ." *Continental T.V.* propounded a possible justification for a manufacturer's restriction of intrabrand competition among his dealers, ancillary to organization of a distribution system and aimed at enhancing interbrand competition. Absent such justification, the *per se* rule applies.

tween a major department store and a number of manufacturers and distributors, pursuant to which the latter agreed not to supply a competing store. Subsequent court cases have recognized that *Klor's* was essentially a vertical case,[8] and in *Tysons Corner Regional Shopping Center,* 85 F.T.C. 970, 1010-11 (1975), the Federal Trade Commission rejected an attempt to distinguish *Klor's* on the ground that veto of a new entrant pursuant to a shopping center approval clause would "amount to a concerted refusal to deal only on the part of one competitor (the tenant) and one supplier (the lessor)." Noting that the "presence of more than one party at the same distributional level" is not essential to the *per se* rule fashioned by this Court in *Klor's* and other cases, the Commission held that exclusion of an entrant through "joint activity" of one tenant and one lessor violates "the policy of the antitrust laws which render group boycotts illegal *per se.*"

Thus, whether horizontal or vertical, the issue is whether a concerted refusal to deal may be justified as ancillary to a lawful transaction or relationship. If not, a boycott is properly condemned *per se* because, as the court below noted with regard to horizontal restraints, it is a "naked restraint of trade with no purpose except stifling competition" (Pet. App. 35a). The teaching of *Continental T.V.* is that vertical non-price restrictions,

[8] While the *Klor's* complaint also charged conspiracy among the suppliers, comment on the decision has recognized its essentially vertical nature. *See, e.g., Worthen Bank & Trust Co.* v. *National Bankamericard, Inc.,* 485 F.2d 119 (8th Cir. 1973, *cert. denied,* 415 U.S. 918 (1974)); *E.A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.,* 467 F.2d 178, 186-87 (5th Cir. 1972), *cert. denied,* 409 U.S. 1109 (1973); *Ackerman, Chillingworth, Etc.* v. *Pacific Electrical Contractors Ass'n,* 405 F. Supp. 99 (D.Hawaii 1975), *aff'd,* No. 76-1264 (9th Cir. March 22, 1978).

including exclusive distributorships, which reduce *intrabrand* competition may nonetheless be justified because they serve to enhance *interbrand* competition. The majority below, erroneously relying on *Continental T.V.*, held that the Sears-Whirlpool boycott agreement had to be "examined under the rule of reason standard" because "vertical restrictions . . . promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products." (Pet. App. 35a).

The *Continental T.V.* rationale, however, presupposes that the case involves a manufacturer seeking to achieve efficiencies in the distribution of his branded product, and thereby enhance interbrand competition. The court of appeals erred in failing to consider whether the promotion of "efficiencies in the distribution of its products" was either the motive or result of the agreement to terminate Oreck. Such consideration immediately discloses that the Sears-Whirlpool agreement cannot be justified under any of the grounds discussed by this Court as possible justifications for vertical restrictions.[9] As the dissent aptly observed, "No

[9] Among the justifications discussed in *Continental T.V.* are: to allow the manufacturer to achieve distribution efficiencies in distribution of his branded product; to obtain retailer investment in promotion or in service and repair facilities; to avoid the "free rider" effect which would discourage such retailer investment and effort. 433 U.S. at 55. *See also,* Sullivan, *Antitrust,* pp. 411-21 (1977); Handler, "Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court—1977," 77 Columbia L. Rev. 979, 986 n.39 (1977); Posner ,"Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions," 75 Columbia L. Rev. 282, 283-99 (1975). For a discussion of possible procompetitive benefits and justifications of vertical restrictions, see ABA Antitrust Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition, 67-71 (1977).

redeeming virtue has been asserted to justify the conspiracy between Whirlpool and Sears to terminate Oreck, as found by the jury; nor has it ever been suggested that benefits to the market-place will result from this conspiratorial termination" (Pet. App. 55a).

The court's error is vividly demonstrated by its characterization of this case as "in essence, an exclusive distributorship controversy" and its heavy reliance on dealer substitution cases. (Pet. App. 32a, 35a). In fact, it was no such thing. There was never any issue or defense presented that Whirlpool had selected Sears as its exclusive distributor, or that the termination of Oreck was related to any such decision. Thus, there was no evidence or argument by defendants that Sears' marketing, service and promotion of "Kenmore" was affected by Oreck's development of the market for "Whirlpool" machines. The district court explicitly held that the two brands were different in appearance, quality and performance;[10] and the panel majority observed that the Whirlpool and Kenmore brands were not in an intrabrand competitive relationship, stating that Oreck's sale "of vacuum cleaners under the 'Whirlpool' label would not, from the point of view of the public consumer, have any particular effect on competition with machines sold by Sears" under the "Kenmore" brand.[11]

There was, in sum, no claim that a Sears-Whirlpool combination aimed at Oreck could be justified as ancil-

[10] Tr. 1371-73, in rejecting Oreck's Robinson-Patman claims on the ground that the products were not of like grade and quality.

[11] Pet. App. 11a. See also Whirlpool counsel's reference to the testimony of defendants' expert "that Sears and Oreck were in different businesses". (Tr. 1746).

lary to the legitimate needs of Whirlpool's distribution system. *Cf. Tysons Corner Regional Shopping Center,* at 1011. To the contrary, the sole defense throughout was that there was simply no agreement to eliminate Oreck as a seller of Whirlpool cleaners. Accordingly, the defendants' closing arguments to the jury will be searched in vain for any contention that Sears and Whirlpool had an exclusive distributorship, that termination of Oreck was justified to protect any such Sears-Whirlpool arrangement, to enhance sales of Sears' Kenmore brand, to avoid "free rider" effects, or, indeed, for any of the reasons recognized in *Continental T.V.* as justifications for restricting intrabrand competition. Instead, the only arguments made, and repeated again and again, were that Whirlpool had acted unilaterally and independently of Sears for its own reasons; that Sears had no interest in the relations between Whirlpool and Oreck; and that there had never even been any communication between Sears and Whirlpool regarding Oreck or his termination, much less any pressure by Sears.[12] The absence of any involvement or communication by Sears was the crux of the defense presented at trial, and it was rejected by the jury.

[12] For example, in his closing statement Whirlpool's counsel repeatedly stressed the testimony of Sears and Whirlpool officials denying ***any*** communication regarding Oreck: "And every single one of them denied receiving complaints or making complaints. They denied having anything to do with the termination insofar as Sears is concerned" (Tr. 1718-19; see also Tr. 1745-46). The Whirlpool official who terminated Oreck was cited as saying "that Sears played no part in his decision—he didn't consult with Sears, they hadn't any complaints from Sears" (Tr. 1711). Further, "there isn't one single shred of evidence to tie Sears into the termination" (Tr. 1712, see also Tr. 1722).

Whirlpool's defense may be summed up in this statement:

In these circumstances, the case did not present any possible ground of justification applicable to intrabrand restrictions, and *Continental T.V.*'s rule of reason criteria were not applicable. The Sears-Whirlpool agreement to refuse to supply Oreck was a non-ancillary, "naked," restraint of trade, a boycott unlawful *per se*. Review by this Court is needed to correct the error below and to dispel promptly the erroneous concept that naked trade restraints, if vertical, are defensible under the rule of reason.

2. In the context of the issues presented by the parties and the record evidence, the district judge properly presented the case to the jury, and reversal was erroneous.

This case involved the claim that Whirlpool cut off plaintiff Oreck, its exclusive distributor of vacuum cleaners under the tradename "Whirlpool," pursuant to agreement with its major vacuum cleaner customer, Sears, which sold under the brand "Kenmore". As we have shown, the sole defense was that Whirlpool had acted entirely unilaterally, because of alleged dissatisfaction with Oreck's marketing methods, and that there had been no pressure, communication, or agreement with Sears. As the dissent below pointed out, the jury reasonably rejected this defense in light of Oreck's success in selling the Whirlpool product, the evidence

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"And I say to you again that unless you find that Sears is involved in all of this, if this is a decision that Whirlpool makes on its own, you cannot find for the plaintiff in this case." (Tr. 1717).

Similarly, Sears' counsel stated as its essential defense:

"Sears was not involved in this entire Oreck-Whirlpool controversy and on that basis you must render a verdict in favor of Sears and Whirlpool." (Tr. 1754).

of Sears' pressure on Whirlpool, the defendants' failure to call a Whirlpool official to explain or deny his damaging deposition statements and documents which attested to Sears' blatant pressure on Whirlpool first to limit Oreck's activities, and then to terminate Oreck. (Pet. App. 44a-49a).

It is crucial that at trial defendants made no argument that Whirlpool cut off Oreck in order to obtain efficiencies of exclusive distribution, avoid "free rider" problems or the other reasons given in *Continental T.V.* as possible justification for reducing intrabrand competition in order to promote interbrand competition.

Consequently, the issue presented by the parties and the evidence was *not* the justification and reasonableness of a vertical agreement in restraint of trade; the issue presented was only whether there had been a Sears-Whirlpool agreement to terminate Oreck. It is for this reason, quite clearly, that defendants' counsel did not object to the parts of the charge which the court of appeals has found defective and why counsel for Whirlpool in fact explicitly embraced language that the majority below held to be grounds for reversal (see note 4, *supra*). In the unambiguous circumstances of this case, the district court's charge was unexceptionable.[13]

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[13] With respect to the defense of unilateral conduct actually asserted by defendants, the district judge charged as follows (J.A. 2922):

"I charge you that a manufacturer has the right to deal with whom he pleases and to select his customers at will as long as there is no resultant effect which is violative of the antitrust laws. The manufacturer may discontinue an exclusive distributorship or may refuse to renew an exclusive distributorship for business reasons which are sufficient to the manufacturer alone and any adverse effect such a decision

3. The majority below also erred in holding that a rule of reason instruction was required because "Whirlpool's decision not to renew Oreck's distributorship was an exercise of its contractual rights" and therefore, non-renewal, even in response to "inducements by Sears to Whirlpool to allow the contract with Oreck to expire" would not violate the Sherman Act "without some further showing that . . . there was an anticompetitive effect in the vacuum cleaner industry as a whole . . ." (Pet. App. 40a).[14] This is clear error in two respects. First, the cases are legion which have condemned terminations and non-renewals pursuant to contract terms, when additional circumstances demonstrate antitrust violations, including illegal boycotts.[15] Second, by requiring proof of "anticompetitive effect in the industry as a whole," the majority has resurrected a general market effect or "public injury" requirement in direct conflict with this Court's decision in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc., supra.*[16] The court has thus erected an almost insuperable barrier to recovery in group boycott cases by small businesses like Oreck—a barrier that becomes greater as the victim becomes smaller. Review by this Court is required in order to make clear to businessmen and the courts that the discredited "public injury" requirement has not been reintroduced into the law in the guise of a rule of reason test.

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may have upon the business of the distributor is immaterial in the absence of any arrangement or conspiracy restraining trade or competition."

Indeed, in the absence of argument or evidence as to the justification for and reasonableness of a Sears-Whirlpool boycott agreement, it might well have been prejudicial error for the trial court to have charged the jury with respect to those matters. Wright and Miller, *Federal Practice and Procedure*, § 2556 ("Nor should a charge be given on a matter, whether or not raised in the pleadings, if it is not supported by the evidence"); *McCarthy* v. *Pennsylvania R. Co.*, 156 F.2d 877 (7th Cir. 1946), *cert. denied*, 329 U.S. 812 (1947).

[14] The court of appeals also took the trial judge to task because he "failed to marshal any of the evidence presented by Whirlpool to show that its refusal to renew Oreck's distributorship was motivated and that its actions were consistent with the terms of the 1968 contract." (Pet. App. 36a). This statement is unwarranted. The district judge explicitly told the jury that he was not going to marshal the evidence on each side, and that the parties' counsel had done so. (J.A. 931). There is no requirement that a trial judge marshal or comment upon the evidence. See Wright & Miller, *Federal Practice and Procedure*, § 2557; *see also* Wright, *Law of Federal Courts*, 416-17.

CONCLUSION

The decision below erroneously overturned a jury verdict in this antitrust case on the ground of a supposed defect in the charge not raised by defendants.

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[15] *See, e.g., Poller* v. *Columbia Broadcasting Co.*, 368 U.S. 464 (1962); *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459 (9th Cir.), *cert. denied*, 377 U.S. 933 (1964); *Milsen Co.* v. *Southland Corp.*, 454 F.2d 363 (7th Cir. 1971); *Englander Motors, Inc.* v. *Ford Motor Co.*, 267 F.2d 11 (6th Cir. 1959); *Osborn* v. *Sinclair Refining Co.*, 324 F.2d 566 (4th Cir. 1963); *Interphoto Corp.* v. *Minolta Corp.*, 295 F. Supp. 711 (S.D.N.Y. 1969), *aff'd per curiam*, 417 F.2d 621 (2d Cir. 1969).

[16] In *Klor's*, the court of appeals had upheld dismissal of the complaint for lack of the "required public injury," since " 'there was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected . . .' " (359 U.S. at 210). This Court reversed on the ground that a group boycott "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy. Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups." *Id.* at 213.

Under the holding of the court of appeals, a naked boycott agreement, if vertical, must be tested under the rule of reason, even where there is not an iota of business justification or of stimulation to interbrand competition, and it will be upheld unless anticompetitive effect in the overall industry can be shown. The court of appeals decision is in direct conflict with the decisions of this Court dealing with boycotts and vertical restrictions, and with a leading Federal Trade Commission decision. Certiorari should be granted to correct the errors below and to clarify an important area of antitrust law.[17]

Respectfully submitted,

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August 29, 1978

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[17] The errors below require reinstatement of the jury verdict and the judgment based thereon, with the exception of the 10% of that judgment representing an award of damages caused by Oreck's exclusion from the Canadian market. Oreck accepts the necessity of a new trial on that minor aspect of the case; however, contrary to the holding of the court of appeals, the introduction of evidence regarding Canada does not necessitate a new trial on the principal part of the case. See n. 2 *supra* and the dissent of Judges Mansfield and Feinberg. (Pet. App. 43a, n. 1).

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT.

ORECK CORPORATION,
Plaintiff-Appellee,

v.

WHIRLPOOL CORPORATION and
SEARS, ROEBUCK AND CO.,
Defendants-Appellants.

No. 1173, Docket 76-7631.

Argued June 3, 1977.

Decided Sept. 21, 1977.

Rehearing En Banc Granted Dec. 15, 1977.

Before Anderson and Mansfield, Circuit Judges, and Brient, District Judge.*

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* Of the Southern District of New York, sitting by designation.

ROBERT P. ANDERSON, Circuit Judge.

This is an appeal from a judgment entered on July 13, 1976 in favor of Oreck Corporation (Oreck) against defendants Whirlpool Corporation (Whirlpool) and Sears, Roebuck & Co. (Sears) on two counts of a seven count complaint charging violations of § 1 of the Sherman Act, 15 U.S.C. § 1. Oreck was awarded $2,250,000 (after trebling) in monetary damages. For the reasons set forth below, we reverse.

The factual basis of this controversy is fairly straightforward. Whirlpool is a manufacturer of vacuum cleaners (as well as other household appliances not relevant here) and has been in that business since 1957, when it acquired the Birtman Electric Co. Birtman had previously manufactured vacuum cleaners for Sears, under the Kenmore label. Whirlpool continued this business, and also sought to sell vacuum cleaners under its own "RCA-Whirlpool" label. It discontinued the line of sales under this label for approximately two years after which it re-entered the field through a designated exclusive distributor, Oreck, which was appointed in 1963 for an initial term of five years, with automatic extensions for one year periods thereafter, absent six months prior notice of termination by either party. Whirlpool gave Oreck formal notice of termination of the agreement on June 27, 1968, but instead, a new agreement, dated August 1, 1968, was drawn up extending Oreck's distributorship until December 31, 1971, with no provision for extension. At the expiration of this extension, however, Oreck's relationship with Whirlpool, as its exclusive distributor, was not renewed or extended, and it terminated completely. The instant action followed in September of 1972.

This lawsuit and the underlying controversy, are based on the claimed *reasons* why Oreck was not afforded an additional term as Whirlpool's exclusive distributor of vacuum cleaners. Oreck's successful contention below was that its agreement was not renewed by Whirlpool at the behest and insistence of Sears, a much larger pur-

chaser of Whirlpool vacuum cleaners than Oreck. Sears' association with Whirlpool extended back to 1925, when Sears acquired 750 shares of Whirlpool's forerunner corporation, the Upton Machine Co.[1] By January of 1960, Sears owned approximately 4% of Whirlpool's outstanding stock. Oreck also contended that Sears did not want Oreck to compete with its own line of Kenmore vacuum cleaners, also manufactured by Whirlpool, and that it used its influence with Whirlpool to have Oreck's exclusive distributorship terminated.

Accordingly, Oreck's complaint charged both Whirlpool and Sears with engaging in a contract, combination or conspiracy in unreasonable restraint of trade to exclude Oreck from the vacuum cleaner market in the United States and Canada (counts one and two of the complaint) and with forcing or persuading potential customers of Oreck from refusing to deal with Oreck (count three). Additionally, count four of the complaint charged Whirlpool with selling vacuum cleaners, attachments and parts to Sears at unlawfully discriminatory prices, contrary to 15 U.S.C. § 13(a) and count five with Sears' knowing inducement or receipt of those same discriminatory prices, prohibited by 15 U.S.C. § 13(f). Finally, count six alleged irreparable damage to Oreck as a result of Sears' and Whirlpool's violations of the antitrust laws and Oreck's absence of an adequate remedy at law, and count seven pleaded damage to Oreck in the amount of $6,500,000 as a result of Sears' alleged status as a "control person" over Whirlpool (because of Sears' stockholdings in Whirlpool) and the close relationship between the

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[1] According to Sears' answer to one of plaintiff's interrogatories, after Sears' purchase of 750 shares of Upton Machine Co. in 1925, "the Upton Machine Company underwent major corporate changes, including merger with the Seeger Refrigeration Company in 1955, and The Birtman Electric Company in 1957. The name of the resulting corporation was changed to Whirlpool Corporation in 1957."

two defendants over a period of 50 years. Counts three, four and seven were voluntarily dismissed on Oreck's motion; and the court directed a verdict for defendants on counts three and four, the alleged Robinson-Patman Act violations.

The trial testimony therefore centered on counts one and two, the alleged Sherman Act violations. Plaintiff's case for liability rests largely upon the testimony of Marshall Oreck, its General Manager, and upon the testimony of its President and founder, David Oreck, who told of his relationship with Whirlpool over the years and of his belief, derived primarily from communications with one John Payne, a salesman for Whirlpool, that the reason for the cancellation was Sears' desire to end competition from Oreck. Plaintiff also presented the deposition of Payne, who did not appear at the trial. Hyman B. Ritchin, an economic consultant, and Ernest L. Sommer, a certified public accountant, gave testimony for the plaintiff on the issue of damages.

By way of defense and explanation of Oreck's cancellation, Whirlpool presented the testimony of its officers who dealt with Oreck, showing that the reason for the cancellation was Oreck's failure to follow an assigned marketing strategy. Jack D. Sparks, a Vice President and Director of Whirlpool, who made the decision to terminate Oreck, testified that the exclusive distributor had failed to market Whirlpool vacuum cleaners through "major accounts" (department store chains and the like) and had instead resorted to "commercial-type distribution" (janitorial supply houses and mail order sales), a strategy which did not agree with Whirlpool's desires. Sparks explained that he accepted a subordinate's recommendation to terminate Oreck "because Oreck corporation had failed to reach the original objective when we first conceived the program in 1963 which was to set up a one-step distribution system nationally to major accounts on vacuum cleaners with the hopes that ultimately we would have a system that other

specialty-type products could go through." Sparks denied being concerned with competing against Sears, pointing out that "the system we . . . talked about [distribution to "major accounts" such as department stores] would be in direct competition with Sears."[2]

Significantly, however, plaintiff presented *no* evidence or testimony that the net economic effect of Oreck's cancellation was unreasonably to restrain trade in the vacuum cleaner industry in the United States and/or Canada. In fact, as to this critical inquiry, David Oreck testified on direct examination that "[t]he vacuum cleaner industry is, indeed, a very large one" and that during 1971, when Oreck sold 78,203 vacuum cleaners, "the vacuum cleaner industry in 1971 was about 7.8 million purchases." Basic arithmetic reveals, therefore, that Oreck had a 1% market share at the time of the completion of his exclusive distributorship for Whirlpool. Moreover, David Oreck admitted on cross-examination that, following this event, the plaintiff obtained an alternative source of supply and was, at the time of trial, the world's largest supplier of "top fill upright vacuum cleaners."

The above testimony and the other evidence adduced at the trial by the plaintiff show nothing more than the refusal by Whirlpool to renew Oreck's exclusive distributorship of Whirlpool vacuum cleaners under the "Whirlpool" label and the replacement of Oreck, in effect, by Sears, the other existing distributor, who sold the same manufacturer's vacuum cleaner but under the label, "Kenmore." It is well-settled that

> "[w]hen an exclusive dealership 'is no part and parcel of a scheme to monopolize and effective competition exists at both the seller and buyer levels, the arrange-

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[2] It is thus difficult to understand the dissent's view that there was "[n]o substantial evidence . . . offered to show that Oreck was terminated for some possible lawful reason. . ." (Emphasis supplied.)

ment has invariably been upheld as a reasonable restraint of trade. In short, the rule was virtually one of *per se* legality' until the District Court decided the present case [which was reversed]." (Cases cited in footnote omitted.) *Packard Motor Car Co. v. Webster Motor Car Co.*, 100 U.S.App.D.C. 161, 163, 243 F.2d 418, 420, *cert. denied*, 355 U.S. 822, 78 S.Ct. 29, 2 L.Ed. 2d 38 (1957).[3]

The Supreme Court expressed much the same rationale in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87

[3] The holdings of *Packard Motor Car Co. v. Webster Motor Car Co.*, 100 U.S.App.D.C. 161, 243 F.2d 418, *cert. denied*, 355 U.S. 822, 78 S.Ct. 29, 2 L.Ed.2d 38 (1957), and a similar case, *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F.Supp. 899 (D.Md.), *aff'd*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823, 78 S.Ct. 30, 2 L.Ed.2d 38 (1957), were succinctly summarized in a case relied on by the dissent, *Quality Mercury Inc.* v. *Ford Motor Co.*, 542 F.2d 466 (8th Cir. 1976), as follows: "Both courts [*Packard* and *Schwing*] held that a manufacturer has a right to select his customers and may agree with one to exclude another, if: (1) the agreement is not a horizontal one between competitors; (2) the manufacturer is not using it to establish market dominance; or (3) the manufacturer is not using it to promote a monopoly." 542 F.2d at 470. As is made clear in the remainder of this opinion, Whirlpool, as the manufacturer of vacuum cleaners, did not engage in a horizontal agreement between competitors, while Oreck submitted no substantial proof that Whirlpool's motive in cancelling Oreck was to establish market dominance or to promote a monopoly in the vacuum cleaner business.

The dissent also relies on *Quality Mercury, supra*, for the proposition that a *per se* rule under § 1 of the Sherman Act becomes applicable when "a horizontal, intrabrand competitor exercises a veto power over plaintiff's access to the manufacturer's goods or trademark . . .." The result in *Quality Mercury*, however, involving the refusal of Ford to grant a Lincoln dealership in the Minneapolis area allegedly because a preexisting dealership had veto power over such a decision, was to remand for trial in order to allow the plaintiff "an opportunity to prove the unreasonableness of the restraint," 542 F.2d at 472, decidedly *not* a *per se* approach to the alleged Sherman Act violation.

S.Ct. 1856, 18 L.Ed.2d 1249 (1967), *overruled on other grounds, Continental T.V., Inc. v. GTE Sylvania, Inc.*, —— U.S. ——, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), where it held that a manufacturer may choose his own customers and franchise certain exclusive dealers:

> "If the restraint stops at that point—if nothing more is involved than vertical 'confinement' of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act." 388 U.S. at 376, 87 S.Ct. at 1864.

See also, Joseph E. Seagram & Sons, Inc. v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970) ("it is well settled that it is not a *per se* violation of the antitrust laws for a manufacturer or supplier to agree with a distributor to give him an exclusive franchise, even if this means cutting off another distributor [citing cases]."); [4] *Bay City-Abrahams Bros. Inc.* v. *Estee Lauder Inc.*, 375 F.Supp. 1206, 1214-16 (S.D.N.Y.1974); *Top-All Varieties, Inc.* v. *Hallmark Cards, Inc.*, 301 F.Supp. 703, 704-5 (S.D.N.Y. 1969).

Under these standards, given additional weight by the Supreme Court's recent over-ruling of the *per se* approach

[4] *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125, 93 S.Ct. 938, 35 L.Ed.2d 256 (1973), cited in the dissent as limiting the *Hawaiian Oke* holding, was a case where hotels, restaurants and companies supplying those businesses in Portland, Oregon, organized an association to attract conventions to their city. The association was financed by contributions from its members. "To aid collection, *hotel members . . . agreed* to give preferential treatment to suppliers who paid their assessments, and to curtail purchases from those who did not." 467 F.2d at 1002. (Emphasis supplied.) *Hilton Hotels* thus involved a horizontal agreement between competitors at the same level, not the situation in *Hawaiian Oke* or the present case.

to vertical location restrictions of *United States v. Arnold, Schwinn & Co., supra,* in *Continental T.V., Inc. v. GTE Sylvania Inc., supra,* Oreck was required to show not only conspiratorial conduct by Sears and Whirlpool in order to recover under § 1 of the Sherman Act, but also credible proof that the net result and effect of the allegedly conspiratorial conduct of the defendants was anticompetitive in the vacuum cleaner industry as a whole or that the conspiracy was designed to drive Oreck out of the vacuum cleaner business.

In instructing the jury, the trial court quoted the language of § 1 of the Sherman Act and then further defined the meaning of the terms within that statute as follows:

> "As to the meaning of the term 'restraint of trade,' you are instructed that this general term applies only to unreasonable restraints and not to all possible restraints of trade. Not all restraints of trade are reasonable. All business affects trade in some way.
>
> *The violations alleged by plaintiff are,* if you credit them, *unreasonable restraints of trade.* If you do not credit them, Whirlpool's conduct was not an unreasonable restraint of trade." (Emphasis supplied.)

The trial court further instructed the jury with regard to count one that "[i]f you find there was such an agreement [between Whirlpool & Sears 'to exclude Oreck from a market in vacuum cleaners or Whirlpool vacuum cleaners anywhere'], then you should go on to consider damages, if any, flowing from it." An almost identical charge was given as regards count two, dealing with Oreck's alleged exclusion from the Canadian market. We hold that the above-quoted portions of the jury instructions constitute plain error which make necessary a reversal of this judgment. Under these instructions, the jury could have gone no further than to find a conspiracy followed by an assessment of damages.

Oreck's argument that it *did* show an unreasonable restraint of trade because the net effect of its termination

was to provide Sears with a "monopoly position" in the market for Whirlpool vacuum cleaners is plainly unpersuasive. Oreck did not demonstrate anything unique about Whirlpool vacuum cleaners sufficient to establish them as a separate market apart from all other brands, *United States v. E. I. DuPont de Nemours & Co.,* 353 U.S. 586, 593, 77 S.Ct. 872, 1 L.Ed2d 1057 (1957); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.,* 508 F.2d 547, 550-52 (1st Cir. 1974). Oreck's further attempt to characterize its cancellation as a "group boycott" under the rule of *Klor's Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), and *United States v. General Motors Corp.,* 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed. 2d 415 (1966), which treats such behavior as a *per se* violation of § 1 of the Sherman Act, is similarly incorrect. In *Klor's,* the Supreme Court specifically noted that "[t]his is not a case of . . . a manufacturer and a dealer agreeing to an exclusive distributorship," 359 U.S. at 212, 79 S.Ct. at 709-10. The present case *is,* in essence, a case involving an exclusive distributorship controversy, and the "group boycott" doctrine is, therefore, not applicable. Had Sears joined with other retailers of Whirlpool vacuum cleaners to drive Oreck out of the vacuum cleaner market, this court would have been presented with a totally different situation, but Sears did not do so, and, therefore, *Klor's* is not applicable. Because Sears is a large company presumably selling a large number of vacuum cleaners does not, *ipso facto,* convert this case into a horizontal conspiracy warranting *per se* treatment.[5]

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[5] The dissent attempts to get around these facts by claiming that "Sears was the equivalent of many Whirlpool vacuum cleaner distributors," a novel theory which simply transforms Sears into something it is not. The implications of applying such a concept in future cases require the trial court to make legislative determinations. When is a single company "big" enough to be considered tantamount to a series of "little" companies? The dissent presumably leaves the determination of what is a "big" company for this purpose of one case but not "big" for the purpose of another

Any effect on price competition for the sale of Whirlpool vacuum cleaners, brought about by the cancellation of Oreck's exclusive distributorship, cannot have any legal or economic significance in the present case. Economically, the view that the net effect of Oreck's cancellation will be to raise the price of Whirlpool vacuums has no significance absent a showing that consumers cannot substitute for Whirlpool another type of vacuum cleaner that is as effective and equally attractive as Oreck's was in price. In addition, Oreck has neither charged nor proven a conspiracy to fix prices for Whirlpool vacuum cleaners. Nowhere in the complaint does Oreck allege that Whirlpool's refusal to deal was aimed at eliminating intrabrand price competition. The inappropriateness of any claim of price-fixing is made

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case, to the wisdom of the trial judge, in the complete absence of any criteria or standards which the court can apply.

The dissent also charges the majority with looking not to substance but to form. Perhaps the best rejoinder to such a characterization of our opinion is contained in Judge Medina's fine opinion in *United States v. Morgan*, 118 F.Supp. 621 (D.C.1953), an action under §§ 1, and 2 of the Sherman Act against seventeen investment banking firms charging a combination, conspiracy and agreement to restrain and monopolize the securities business in the United States, in which the court wrote:

> "Much of the confusion, especially in the field of antitrust law, is due to the fact that the breadth and scope of the Sherman Act are so general and beneficent that lawyers and even judges often fail to heed repeated admonitions that each case must necessarily stand on its own legs, and that the conclusions reached in each depend largely upon the peculiar characteristics of the particular industry involved." 118 F.Supp. at 688.

In short, the facts and circumstances of this controversy do not call for the application of the *per se* rule against price fixing and/or group boycotts, so that the *per se* approach must not be dogmatically followed because it was used in other cases in which those factors were present. Indeed, the dissent's attempt to convert this case into one involving a horizontal price fixing conspiracy itself might be characterized as looking to form rather than substance.

even more clear by the fact that Sears markets its vacuum cleaners under the "Kenmore" label. Oreck's exclusive distributorship of vacuum cleaners under the "Whirlpool" label would not, from the point of view of the public consumer, have any particular effect on competition with machines sold by Sears.

Indeed, to rule otherwise would place intolerable restraints on the ability of a manufacturer to award and cancel an exclusive distributorship where no public harm has been shown. Whirlpool would be thereby compelled to continue Oreck's exclusive distributorship indefinitely, despite the manufacturer's clear intent and desire not to renew it and in derogation of its express contractual right and power not to renew it. Blindly protecting Oreck without regard to the cancellation's effects on the affected market thus disregards the well-established rule that "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors* . . . .'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (emphasis in original).

The judgment of the district court, based as it is on a finding of liability on the part of the defendants, is reversed and the case is remanded for a new trial. In doing so, we express no opinion as to the correctness of those portions of the trial court's jury instruction dealing with the formulation of damages.

MANSFIELD, Circuit Judge (dissenting):

With due respect, I must dissent. This case is governed by well-settled antitrust law principles governing combinations and conspiracies designed to restrain competition on the part of a specific competitor—in this case Oreck—which the majority chooses to disregard.

The evidence, viewed most favorably to plaintiff-appellee Oreck, as it must be after the jury's verdict, *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 696, 82 S.Ct. 1404,

8 L.Ed.2d 777 (1962), reveals a classic *per se* restraint of competition of the type condemned by the Supreme Court in *United States v. General Motors,* 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). Whirlpool, a large manufacturer of appliances, including vacuum cleaners, combined with Sears, Roebuck, a merchandising giant which for 40 odd years had distributed the lion's share of Whirlpool's entire output, to stop plaintiff-appellee Oreck, the only other distributor of Whirlpool vacuum cleaners, from competing against Sears in the sale of Whirlpool-made machines. The motive was clear—to prevent Oreck's price-cutting and other competitive practices from interfering with Sears' higher prices and its sales of Whirlpool-made vacuum cleaners. When Oreck refused to knuckle under as requested, the combination agreed to have Whirlpool cut it off as a distributor of Whirlpool machines, which was done even though Oreck had dramatically increased its sales of Whirlpool vacuum cleaners from 8,384 units to 78,203 units over the preceding four years. As a result, the public lost the benefit of Oreck's competition and particularly of its lower prices in the sale of Whirlpool vacuum cleaners. Thereafter, if customers wanted Whirlpool machines they would have to buy them from Sears and pay Sears' higher prices. The principles governing such a case were summarized by the Supreme Court in *United States v. General Motors,* 384 U.S. at 146-47, 86 S.Ct. at 1331 (1966) as follows:

> "The principle of these cases is that where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. See Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U.Pa.L.Rev. 847, 872-885 (1955). Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved

> by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed—as in *Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n, supra* [312 U.S. 457] at 468 [61 S.Ct. 703, 85 L.Ed. 949].
>
> We note, moreover, that inherent in the success of the combination in this case was a substantial restraint upon price competition—a goal unlawful *per se* when sought to be effected by combination or conspiracy. *E. g., United States v. Parke, Davis & Co.,* 362 U.S. 29, 47 [80 S.Ct. 503, 513, 4 L.Ed.2d 505]; *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 [60 S.Ct. 811, 844, 84 L.Ed. 1129]. And the per se rule applies even when the effect upon prices is indirect. *Simpson* v. *Union Oil Co.,* 377 U.S. 13, 16-22 [84 S.Ct. 1051, 1057, 12 L.Ed.2d 98]; *Socony-Vacuum Oil Co., supra.*"

The background of the conspiracy is instructive. Since 1925 Sears has been the principal distributor of Whirlpool products, currently purchasing more than two-thirds of Whirlpool's total appliance production and, at the time of the events here involved, more than 90% of Whirlpool's vacuum cleaner output for resale under Sears' "Kenmore" label. In addition Sears, beginning in 1925, purchased a substantial block of Whirlpool's common stock and by 1960 became its largest single shareholder, owning 251,192 shares and usually electing one or more of its executives to Whirlpool's board of directors. Sears, therefore, has been in a position to exercise considerable leverage power over Whirlpool's sales and distribution policies and decisions.

Prior to the formation of Oreck in 1963, Whirlpool had periodically attempted to broaden the sales of its vacuum cleaners by marketing them under its own brand name, but had found that its existing distribution network was inade-

quate and that Sears' sales of Whirlpool-manufactured vacuum cleaners at higher retail prices posed a barrier to Whirlpool's entry into price competition against other brands as long as it was restrained by its arrangement with Sears from competing price-wide against Sears in the sale of Whirlpool-made machines. As a result Whirlpool in 1961 discontinued efforts to sell its product independently under its own name and H. Thomas Stroop, a Whirlpool executive, prepared a report entitled "Appraisal of Vacuum Cleaner Business—RCA Whirlpool". He concluded that

> "Unlike other appliances, Sears sells their [vacuum] cleaners for as high or higher prices than major brand competition.
>
> . . .
>
> "Sears becomes very unhappy if RCA WHIRLPOOL product [sic] is retailed for less than the Sears product manufactured by Whirlpool. For this reason, we understand that it has been decided that the RCA WHIRLPOOL brand should have retail prices comparable to Sears.
>
> "Our challenge then . . . 'Can we sell cleaners in volume at high retail prices . . . and if so how?' " (Pl. Ex. 160)

Thereafter, until the events giving rise to this case, Whirlpool-made vacuum cleaners were sold to the public only by Sears.

In April, 1963, Whirlpool's interest in selling its vacuum cleaners under its own brand name was revived. Jack Sparks, Vice President of Whirlpool, approached David Oreck, who had prior to 1961 been in charge of Whirlpool vacuum cleaners sales for Bruno, New York and had been the most successful distributor of Whirlpool vacuum cleaners under its own brand name before Whirlpool discontinued such sales. The result was an agreement to the effect that the newly-formed Oreck Corporation, plaintiff-appellee, would function as the exclusive United States distributor of Whirlpool brand vacuum cleaners. Sparks advised Oreck that he was "not to conflict with Sears, Roebuck on price" and that an internal Whirlpool letter confirmed that Oreck's prices would "emphasize specialty [i. e., high-priced] selling".

Oreck soon found that it could not compete with Sears in selling Whirlpool-made vacuum cleaners at Sears' prices and decided that it could distribute them profitably only by selling at lower prices and through direct mail or institutional supply houses, which would, by reducing or eliminating the middleman's mark-up, enable Oreck to sell competitively and profitably at the lower price levels. Accordingly, in 1967 Oreck began a large-scale mail solicitation campaign which, dramatically increased its sales of Whirlpool machines from a low in 1967 of 8,384 units to an all-time high of 78,203 units in 1971, the year Whirlpool terminated its distributorship. The mail order campaign offered the vacuum cleaners to carefully selected group of consumers at very low prices. Oreck planned to realize its profit from the sale of dust bags and accessories over the 10-15 year life of the product. Despite the prospects for increased sales, three Whirlpool executives, Jack Sparks, Sol Sweet and John Payne, Whirlpool's primary contact with Oreck, all expressed disapproval of the mail order campaign, Payne advising Oreck that Whirlpool's unhappiness was attributable to the company's "other customer" (Sears), which did not like the mail solicitation. Payne also told Oreck that the "other customer got to the head of the company [Whirlpool]".[1]

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[1] Payne's statements were never objected to by defendants as not within the scope of his employment by Whirlpool and are therefore admissible under Rule 801(d) of the Federal Rules of Evidence. Judge Owen also instructed the jury, without objection by defendants, that defendants' failure to call Payne to the stand to explain or refute these statements, given his clear availability, may be taken to indicate that if called his testimony would have been unfavorable to defendants.

That a Whirlpool-Sears combination had been formed to stop Oreck's competition against Sears is further evidenced by events during the preceding year, 1966, when David Oreck sought to obtain Whirlpool's approval of Oreck's plan to market in Canada ,where Sears operated under the name of Simpson-Sears Ltd. Whirlpool refused to make the minor changes in the vacuum cleaner necessary to conform to Canadian Standards Association requirements, as they had done for Sears, and Payne later wired Oreck that it could not market in Canada because Whirlpool could not "obtain a waiver to the current franchise," meaning approval by Sears. A concurrent Whirlpool internal memorandum criticized Oreck's emphasis on low-priced sales, concluding that, "Needless to say, we should not consider for a moment authorizing Oreck to operate in Canada."

By 1968 the Whirlpool-Sears combination was continuing to put the screws on Oreck in an effort to force it to adhere to Sears' prices, sales methods, and markets. In that year Whirlpool refused to manufacture private label vacuum cleaners for certain of Oreck's large customers, and Payne attributed the refusal to "objections from our other customer. . . ." In 1969 and 1970, Whirlpool refused to make minor changes in Oreck's shipping carton to meet parcel post requirements and thereby avoid a penalty charge, even though Whirlpool had provided Sears with an acceptable box for its mail orders. Payne, who handled the matter, attributed the refusal not to engineering difficulties but to a "corporate" decision.

On December 31, 1971, despite Oreck's highest sales level since it had begun selling Whirlpool vacuum cleaners, Whirlpool terminated the Oreck distributorship.

The foregoing, together with other evidence and witnesses viewed by the jury, supported the jury's inference that Whirlpool terminated Oreck as the result of the combined efforts of Sears and Whirlpool to put an end to Oreck's competition against Sears in the sale of Whirlpool

machines, including mail-order solicitation and low prices, to which Sears objected because of the possible adverse effect on its sale of Whirlpool vacuum cleaners under its own label at higher prices and without any Canadian Whirlpool competition. No substantial evidence was offered to show that Oreck was terminated for some possibly lawful reason, such as failure to increase Whirlpool sales or Whirlpool's desire to protect its trade name, other than testimony of Jack D. Sparks and John Payne that Oreck had failed to market to "major accounts," which was understandably rejected by the jury in view of Oreck's tremendous increase in sale of Whirlpool cleaners from 1967 to 1971.

The law governing the case is clear and well-settled. A manufacturer may *unilaterally* choose his customers, *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), and *unilaterally* substitute one exclusive distributor for another, *Alpha Distributing Co. v. Jack Daniels Distillery*, 454 F.2d 442, 452 (9th Cir. 1972). However, it is elementary that a combination between a manufacturer and one or more of its customers which has as its sole object the restraint of another customer's competition through purchase and resale of the manufacturer's product is *per se* illegal. *United States v. General Motors*, 384 U.S. 127, 146-47, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); *United States v. Parke-Davis & Co.*, 362 U.S. 29, 47, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 212, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959); *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 186-7 (5th Cir. 1972), *cert. den.*, 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973); Barber, *Refusals to Deal Under The Federal Antitrust Laws*, 103 U.Pa.L.Rev. 847, 875 (1955).

In *United States v. General Motors, supra*, the manufacturer and a group of its Los Angeles area dealers agreed to discontinue selling Chevrolets through discount houses advertising discount prices and lower financing costs. The

Court characterized the arrangement as a "classic conspiracy in restraint of trade," explaining the application of the *per se* rule as follows:

> "[I]nherent in the success of the combination . . . was a substantial restraint upon price competition—a goal illegal per se when sought to be effected by combination and conspiracy. . . . And the *per se* rule applies even when the effect upon prices is indirect." 384 U.S. at 147, 86 S.Ct. at 1331.

General Motors represented one more application of the basic principle established long ago in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24, 60 S.Ct. 811, 844-45, 84 L.Ed. 1129 (1940) to the effect that

> "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*. . . . Where the means for price-fixing are purchases or sales of the commodity in a market operation or, as here, purchases of a part of the supply of the commodity for the purpose of keeping it from having a depressive effect on the markets, such power may be found to exist though the combination does not control a substantial part of the commodity. . . . Price-fixing agreements may have utility to members of the group though the power possessed or exerted falls far short of domination and control. *Monopoly power (United States v. Patten*, 226 U.S. 525 [33 S.Ct. 141, 57 L.Ed. 333]) is not the only power which the Act strikes down, as we have said. Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under § 1 of the Act."

Moreover, such a combination by agreement to restrain price competition or through refusal to deal with a customer is *per se* illegal whether it is horizontal, vertical or embraces participants from both levels. See, e. g., *United States v. Arnold, Schwinn & Co.*, 388 U.S. at 375-76, 87 S.Ct. 1856, where the Supreme Court observed that a conspiracy embracing both levels is illegal *per se*, when it is "ancillary to price fixing" or "price fixing is 'an integral part of the whole distribution system'," 388 U.S. at 375, 87 S.Ct. at 1864, even if the effect on prices is "indirect," *United States v. General Motors, supra*, 384 U.S at 147, 86 S.Ct. 1321.

The majority further errs in stating that Oreck's complaint fails to allege that "Whirlpool's refusal to deal was aimed at eliminating intrabrand price competition." The complaint alleges clearly an agreement between Sears and Whirlpool to restrain Oreck's competition against Sears in the sale and distribution of Whirlpool-made vacuum cleaners. Plaintiff Oreck alleged, at ¶¶ 14-15 of the First Claim of its complaint, that when Oreck began "to compete seriously with Sears" in the sale and distribution of Whirlpool products—specifically "sales of 'Kenmore' vacuum cleaners" made by Whirlpool—Whirlpool terminated its distributorship to "eliminate any serious competition to Sears, Roebuck from Oreck." These allegations were clearly broad enough to embrace restraint of price competition by Oreck against Sears in the sale of Whirlpool-made vacuum cleaners, an issue that was actually tried without objection. Par. 21 of the complaint, moreover, alleges that improvements in Whirlpool's vacuum cleaner were withheld "with the intent and effect of . . . reducing Oreck's competition with Sears, Roebuck." Although the complaint also alleged that the purpose and effect of the combination was to exclude Oreck generally from the vacuum cleaner market—a type of allegation not unusual in civil antitrust cases—the record, including the examinations of witnesses, summations of counsel and the court's instructions, show that the case was tried

and submitted to the jury on the claim that Whirlpool and Sears combined to restrain Oreck from competing against Sears, particularly on prices, in the sale of Whirlpool-made machines, as a result of which Oreck was ultimately cut off as a distributor of such machines. At trial and prior to the jury's verdict, the court and counsel had no disagreement as to the applicable legal principles, as the following colloquy with respect to the Court's proposed charge shows:

> "The Court: I understand that, but it seems to me that if the jury were to conclude that Sears and Whirlpool had conspired to terminate Oreck to rid Sears of a competitor, they have gone all the farther that they need to go.
>
> "Mr. Turoff [Whirlpool's counsel]: I see now your Honor's argument. I think what you are saying is that if the jury finds that we had a conspiracy for the purpose of getting rid of Oreck, that is an unreasonable restraint of trade. That is, I think, a correct statement of the law."

Thus the evidence presented at trial to the effect that the termination culminated a Sears-Whirlpool conspiracy to eliminate Oreck's competition against Sears, and particularly its price competition, established a *per se* violation of § 1 of the Sherman Act.[2]

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[2] The proof of a conspiracy between Whirlpool and Sears was more than sufficient. Indeed, a manufacturer may be held to violate § 1 of the Sherman Act "irrespective of monopoly or conspiracy," when he refuses to deal with a distributor and thereby creates an "arrangement" in restraint of trade. *Osborn v. Sinclair Co.*, 324 F.2d 566, 573 (4th Cir. 1963). The existence of a conspiracy and Sears' membership and participation could also be inferred from the totality of the course and conduct engaged in by the defendants, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471 (1920). The jury was entitled to rely, among other things, upon (1) Sears' purchase of 90 per cent of Whirlpool's annual production of vacuum cleaners and two-thirds of its production of all appliances, (2) Sears' position on the Whirlpool board, (3) its use of its own brand name (which decreased its reliance on Whirlpool as a source) and (4) Sears' traditional high price structure. This evidence of a motive to maintain high prices and leverage over Whirlpool coincided with Whirlpool's irrational termination of an increasingly successful distributor, Oreck's entry into Sears' mail order domain at discount prices, the fact that "an honorary director of Sears" placed Oreck's mail order solicitation before the Whirlpool board, and Payne's statements to David Oreck admitting that Sears had applied pressure on Whirlpool. Viewed as a whole the evidence clearly supported the jury's finding of conspiracy.

Since a refusal to deal for the purpose of eliminating intrabrand price competition is thus *per se* unlawful, the majority errs in holding that plaintiff Oreck was required also to prove a restraint of trade in the relevant market. In *General Motors*, where the Supreme Court found *per se* unlawful a similar combination to restrain intrabrand price competition by refusing to deal with "discounters" of Chevrolet cars, the Court deemed it unnecessary to consider the effect of the intrabrand competition on the relevant market or the availability of alternative sources of supply to the discounters. Indeed, as early at *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307 (1922), the court condemned the boycott of price cutters, without regard to the availability of alternative products. *See also Ford Motor Co. v. Webster's Auto Sales Inc.*, 361 F.2d 874 (1st Cir. 1966) (*per se* rule applied without regard to alternative sources of supply available to plaintiff).

The dealer-termination cases relied upon by the majority, see, e. g., *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1972), *Alpha Distributing Co. v. Jack Daniels Distillery*, 454 F.2d 442, 452 (9th Cir. 1972), and *Packard Motor Car Co. v. Webster Motor Car Co.*, 100 U.S.App.D.C. 161, 243 F.2d 418, *cert. denied*, 355 U.S. 822, 78 S.Ct. 29, 2 L.Ed.2d 38 (1957), are all clearly distinguishable and do not govern the facts of this case. They stand simply for the proposition that a

manufacturer may unilaterally terminate or replace an exclusive distributor for legitimate business purposes without violating § 1 of the Sherman Act. The critical distinction is that in the cases relied upon by appellants, unlike the present case or *General Motors,* there was no evidence that the cutoff or substitution was pursuant to a combination to restrain competition by the victim against the conspirators in the sale of the product. Indeed, each of the dealer termination cases finding no violation of § 1, including the carefully reasoned opinion in *Hawaiian Oke,* recognize that a *per se* rule would apply to a dealer termination where the manufacturer had the "anticompetitive objective" of excluding "one or more so-called 'discounters' or 'price cutters' ". 416 F.2d at 76. In *Hawaiian Oke* no such evidence of anticompetitive reason or effect was offered by the plaintiffs and the Court of Appeals understandably found reversible error in the district court's instruction that a *per se* violation is made out by any agreement which "is bound to reduce another businessman's opportunity to compete in the same market." 416 F.2d at 75. However, the court was careful to distinguish the case from those, like the present case, where an objective was to restrain competition, stating:

> "In other cases, there was concerted action by one group to put one or more of their competitors out of business, or to impair their ability to compete with the conspirators. *See Silver v. New York Stock Exchange,* 1963, 373 U.S. 341, 347, 83 S.Ct. 1246, 10 L.Ed.2d 389; *Radiant Burners v. Peoples Gas Light & Coke Co.,* 1960, 364 U.S. 656, 81 S.Ct. 365, 5 L.Ed.2d 358; *Associated Press. v. United States, supra* [326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013]. . . . In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 1951, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219, there was an agreement between sellers to refuse to sell to wholesalers who would not agree to abide by maximum resale prices fixed by the sellers. Thus the boycott of the plaintiff to that case was part of a price-fixing scheme. . . .

> "Here, plaintiff presented no evidence whatever that either Seagram or Barton had any *antitcompetitive* motive for terminating plaintiff as their distributor. There were no price fixing or other similar motives or demands or activities." *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d at 77-78.

The limitations of the *Hawaiian Oke* decision were further made clear by the Ninth Circuit in *United States v. Hilton Hotels Corp.,* 467 F.2d 1000, 1003 (9th Cir. 1972), *cert. denied,* 409 U.S. 1125, 93 S.Ct. 938, 35 L.Ed.2d 256 (1973), where the court held that a refusal to deal in order to coerce competitors or to exclude them from competition (which is the case here) is illegal *per se. Hawaiian Oke* was distinguished as a case in which the manufacturer's "primary purpose" and "direct effect" was to achieve a "legitimate business objective." [3] A similar line of cases has held that, although a manufacturer may unilaterally terminate a distributorship or for his own legitimate business reasons refuse to grant an exclusive distributorship, when a horizontal, intrabrand competitor exercises a veto power over plaintiff's access to the manufacturer's goods or trademark, as Sears did here, an inference of anticompetitive motive and effect is available and the *per se* rule becomes applicable. *Quality Mercury Inc. v. Ford Motor Co.,* 542

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[3] *See also Bushie v. Stenocord Corp.,* 460 F.2d 116, 119 (9th Cir. 1972) (*per se* rule applies to refusals to deal to eliminate price cutters); *Bay-City Abrahams Bros. Inc. v. Estee Lauder Inc.,* 375 F.Supp. 1206, 1216 (S.D.N.Y.1974) (refusal to deal is *per se* illegal if the result is price fixing or the elimination of competition); *Ace Beer Distributors Inc. v. Kohn, Inc.,* 318 F.2d 283, 286 (6th Cir.), *cert. den.,* 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 166 (1963) (same); *E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm.,* 467 F.2d 178, 186-7 (5th Cir. 1972), *cert. den.,* 409 U.S. 1109, 93 S.Ct. 912, 34 L.Ed.2d 690 (1973) (combinations among traders at different marketing levels to exclude a competitor of some member of the combination is illegal *per se*); Barber, *Refusals to Deal Under the Federal Antitrust Laws,* 103 U.Pa.L.Rev. 847, 875 (1955).

F.2d 466, 470 (8th Cir. 1976); *American Motor Inns v. Holiday Inns, Inc.*, 521 F.2d 1230, 1242 (3rd Cir. 1975).

Packard Motor Car Co. v. Webster Motor Car Co., 100 U.S.App.D.C. 161, 243 F.2d 418, *cert. denied*, 355 U.S. 822, 78 S.Ct. 29, 2 L.Ed.2d 38 (1957), relied upon by the majority, is the typical dealer termination case in which evidence was presented to show that the survival of Packard's largest area franchise depended, in the business judgment of the company, upon its being given an exclusive franchise. No evidence was presented, as in *General Motors* and the present case, to show that the dealer was terminated because he was a price cutter or in order to maintain high intrabrand prices.

Similarly, the Supreme Court's recent decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*, —— U.S. ——, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), relied on by the majority, has no application to this case. Although the Court overruled a portion of *United States v. Arnold Schwinn & Co.*, not involved here, it did not change any of the foregoing principles regarding price restraints. On the contrary, it reaffirmed them, restricting its application of the "rule of reason" to exclude vertically-imposed price restraints, ——U.S. ——, 97 S.Ct. 2549 n.18, and *General Motors*-type conspiracies, —— U.S. ——, 97 S.Ct. 2549 n.28.

The majority vainly seeks to get around *General Motors* and other Supreme Court decisions holding similar combinations to restrain competition illegal *per se* by pointing to the fact that more than one competing dealer was involved in the *General Motors* conspiracy and by suggesting that, if Sears had joined with another distributor rather than with Whirlpool to restrain Oreck's price competition, perhaps *General Motors* might apply. The attempted distinction has no legal significance and ignores the substantive fact that Sears was not only the sole other distributor of Whirlpool machines but handled some 90% of the vacuum cleaners made by Whirlpool. Sears was the equivalent of many Whirlpool vacuum cleaner distributors. The effect

of its combining with Whirlpool to stop Oreck's price competition was just as harmful to Oreck and to the public as would be a combination between two small distributors to eliminate a discounter, which under the majority's distinction would be *per se* illegal under *General Motors*. A combination to restrain intrabrand price competition cannot be condoned simply because it consists solely of the manufacturer of the product and its only distributor, a huge merchandising chain, without participation by a second distributor. The law looks to substance, not form, and condemns as *per se* illegal any combination or conspiracy of 2 or more persons to restrain price competition or to eliminate a competitor.

For the foregoing reasons I would affirm the judgment of the district court.[4] The majority has in my view seriously erred in its concept of the antitrust principles that govern this case. The decision departs from basic principles established in numerous decisions of the Supreme Court. It will have mischievous results, since it will be seized upon by those who would otherwise be bound by established precedent to demand similar treatment. It weakens the private enforcement of the antitrust laws, upon which the Executive Branch heavily depends. I therefore dissent.

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[4] I would also find that Oreck's proof of damages was sufficient to meet its burden of proof and to support the jury's verdict since "damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts," *Zenith Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969), and that in the absense of precise damage calculations "the wrongdoer should bear the risk of uncertainty that his own conduct has created." *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 565 (2d Cir 1970). Here plaintiff's evidence of profit structure and sales performance over the years prior to termination and its projections by an expert witness as to future performance, clearly afforded the jury "a reasonable basis of computation." *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684 (1929).

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UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

No. 76-7631

SEPTEMBER TERM, 1977

ORECK CORPORATION, *Plaintiff-Appellee,*

v.

WHIRLPOOL CORPORATION AND
SEARS, ROEBUCK AND CO., *Defendants-Appellants.*

Before: ANDERSON, FEINBERG, MANSFIELD, MULLIGAN, TIMBERS, GURFEIN, VAN GRAAFEILAND, MESKILL, Circuit Judges.

FILED MAY 1, 1978

ON REHEARING EN BANC

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[Opinion]

ANDERSON, Cir. J.: The appellants, Whirlpool Corporation (Whirlpool) and Sears, Roebuck & Co. (Sears), appealed from a judgment entered on July 13, 1976, on a jury verdict against them and in favor of Oreck Corporation (Oreck), on two counts of a seven count complaint charging violations of § 1 of the Sherman Act, 15 U.S.C. § 1. On appeal, a divided panel of this court reversed and remanded the case for a new trial. *Oreck Corp. v. Whirlpool Corp.* [1977-2 TRADE CASES ¶ 61,641], 563 F. 2d 54 (2d Cir. 1977). Appellee's petition for a rehearing *en banc* was granted on December 15, 1977. The hearing of the appeal *en banc* was submitted on briefs by all of the parties and without further oral argument. On reconsideration we concur in the judgment of the panel majority, reverse the judgment of district court, and remand the case for a new trial.

[*Termination of Distributor*]

The material facts of this dispute have been set forth in the opinion of the panel majority and will be reviewed here only briefly. Whirlpool has been in the vacuum cleaner business since 1957 when it acquired the Birtman Electric Co. and began manufacturing vacuum cleaners for Sears, to be sold under the "Kenmore" label. Whirlpool also sought to sell vacuum cleaners under its own tradename. In August, 1963, Whirlpool entered into an agreement with Oreck, by which the latter was appointed the exclusive distributor of vacuum cleaners under the name of "Whirlpool" for an initial term of five years, with automatic extensions

for one-year periods thereafter, absent six months prior notice of termination of the agreement by either party. Whirlpool gave Oreck formal notice of termination of the agreement on June 27, 1968; but after further negotiations, Whirlpool and Oreck entered into a substituted contract, dated August 1, 1968, which extended Oreck's distributorship through December 31, 1971; it did not, however, contain any provision for an extension. On May 14, 1971, Whirlpool informed Oreck that it intended to allow the sales agreement to expire according to its terms and, on December 31, 1971, Oreck's exclusive distributorship of "Whirlpool" products ended. The instant action followed in September of 1972.

This lawsuit is based on Oreck's claim that it was not afforded the opportunity for an additional period of time as Whirlpool's exclusive distributor at the behest and insistence of Sears, a much larger purchaser of Whirlpool products. Accordingly, Oreck's complaint charged both Whirlpool and Sears with engaging in a contract, combination, or conspiracy in unreasonable restraint of trade to exclude Oreck from the vacuum cleaner market in the United States and Canada.[1]

At trial, Oreck's case for liability rested principally upon the testimony of Marshall Oreck, its General Manager, and of David Oreck, its President. It was their contention that the reason for Whirlpool's failure to renew the contract was Sears' desire to end competition from Oreck. By way of defense and explanation of its action, Whirlpool presented the testimony of its officers who dealt with Oreck to show that, among other reasons, the contract was not renewed

[1] At no time in the course of this litigation has Oreck alleged that either its 1963 or its 1968 contract with Whirlpool in and of itself violated § 1 of the Sherman Act. Neither was alleged to be an agreement which attempted to fix prices or eliminate resale price competition, nor did it attempt to impose unreasonable geographical or customer restraints on Oreck's ability to compete.

after December, 1971, because of Oreck's failure to follow the original marketing strategy contemplated by Whirlpool.[2]

[*Economic Effects*]

Oreck presented no evidence that the net economic effect of the non-renewal of its contract was to restrain trade unreasonably in the vacuum cleaner industry in the United States and/or Canada.[3] Nor did it show that alternative sources of supply were unavailable and that it was, therefore, excluded from competition in the vacuum cleaner business. David Oreck admitted that Oreck had been able to obtain vacuum cleaners from another manufacturer and was, at the time of trial, the world's largest supplier of "top fill upright vacuum cleaners."

Despite the lack of mention or reference to any evidence of an anticompetitive purpose or effect in connection with the alleged Whirlpool/Sears agreement, the trial court instructed the jury that,

> The violations alleged by plaintiff are, if you credit them, unreasonable restraints of trade . . . If you find

[2] According to their testimony, it was Whirlpool's intention that Oreck's distributorship would serve as an avenue to the sale of "Whirlpool" vacuum cleaners to department stores and other special retail accounts. There was further testimony that by 1965, Oreck had abandoned this marketing strategy and had resorted to sales to janitorial supply houses, and that Oreck further departed from Whirlpool's original plan by adopting, in 1967, a technique for making sales of "Whirlpool" machines through direct mail orders It was undisputed that by 1970, mail order sales comprised over 90% of Oreck's business.

[3] David Oreck testified that the vacuum cleaner industry is a large one and that during 1971, when Oreck sold 78,203 vacuum cleaners, consumers purchased about 7.8 million cleaners. Oreck, therefore, had no more than a 1% market share at the time of the completion of its exclusive distributorship for Whirlpool. Moreover, there was, at all relevant times, an abundance of vacuum cleaners available in the marketplace which were reasonably interchangeable with those manufactured by Whirlpool.

there was such an agreement [between Whirlpool and Sears "to exclude Oreck from a market in vacuum cleaners *or Whirlpool vacuum cleaners anywhere*"], then you should go on to consider damages. (Emphasis added.)

[*Per Se Violation*]

An almost identical charge was given with respect to count two, dealing with Oreck's alleged exclusion from the Canadian market.[4] Under such instructions, the jury could

[4] Count 2 of the complaint charged that Whirlpool and Sears unlawfully conspired to exclude Oreck from the vacuum cleaner market in Canada. (Counts 3 through 7 were dismissed.) At trial, Oreck contended that Whirlpool's refusal to grant its request that Whirlpool procure Canadian Standards Association approval for the "Whirlpool" vacuum cleaners it desired to sell in Canada, provided substantial evidence of the unlawful conspiracy to remove Oreck's competition against Sears, selling its "Kenmore" machinery through its subsidiary, Simpson-Sears Ltd., the sole distributor of Whirlpool-made products in Canada.

The 1963 and 1968 agreements between Whirlpool and Oreck both specifically stated that Whirlpool was appointing Oreck its exclusive distributor of certain "Whirlpool" products "for the United States of America and its possessions." The parties agree that this provision placed no restriction on the territory in which Oreck might sell goods purchased from Whirlpool. Whirlpool concedes that it refused to obtain Canadian Standards Association approval for the cleaners that Oreck was seeking to market in Canada, but argues that such approval was not a prerequisite to selling in Canada and that, in any event, Oreck sold vacuum cleaners in Canada during the period of its distributorship.

On this count, the trial judge instructed the jury that,

"Arrangements . . . restricting the territory in which a product may be resold are unreasonable restraints of trade in and of themselves . . . You need not determine whether such arrangements are reasonable, or whether they have an impact upon the market place, nor need you be concerned with the business or supposed economic justification for such arrangements . . . ."

In light of the decision of the United States Supreme Court in *Continental T. V., Inc. v. GTE Sylvania, Inc.* [1977-1 Trade Cases

simply have found an agreement by Sears and Whirlpool to exclude Oreck from the sale of Whirlpool vacuum cleaners and, *on that basis,* have found them guilty (as it in fact did) of a *per se* violation of § 1 of the Sherman Act. Yet the very same conduct can constitute the granting of a perfectly legal exclusive distributorship or one, at least, whose legality must be judged under the rule of reason

¶ 61,488], 433 U. S. 36 (1977), this instruction was incorrect. Efforts by a manufacturer to restrict the territory in which a distributor of its products operates are to be examined under the rule of reason standard. See *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.* [1978-1 Trade Cases ¶ 61,926], —— F. 2d ——, 46 U. S. L. W. 2492 (1st Cir. March 17, 1978).

It is undisputed that Whirlpool was not required to obtain Canadian Standards Association approval for its vacuum cleaners as requested by Oreck. That its refusal to do so may have been based on an agreement with its existing Canadian distributor does not, of itself, create a violation of the antitrust laws. It must further be found that this agreement was anticompetitive in purpose or effect. See *Continental T. V., Inc. v. GTE Sylvania, Inc., supra; Quality Mercury, Inc. v. Ford Motor Co.* [1976-2 Trade Cases ¶ 61,086], 542 F. 2d 466 (8th Cir. 1976), cert. denied, *sub nom. Prestige Lincoln Mercury, Inc. v. Quality Mercury, Inc.*, 433 U. S. 914 (1977); *Packard Motor Car Co. v. Webster Motor Car Co.* [1957 Trade Cases ¶ 68,682], 243 F. 2d 418 (D. C. Cir.), cert. denied, 355 U. S. 822 (1957); *Schwing Motor Co. v. Hudson Sales Corp.* [1956 Trade Csaes ¶ 68,292], 138 F. Supp. 899 (D. Md.), aff'd [1956 Trade Cases ¶ 68,564], 239 F. 2d 176 (4th Cir. 1956), cert. denied, 355 U. S. 823 (1957).

The trial judge's failure to instruct the jury on this point was plain error. Moreover, it inevitably prejudiced the jury's consideration of the first count even though the matter of sales in the Canadian market was set out in the second count. In the evidence, in the arguments, and in the district court's charge, this incident was used as an example of the claimed unlawful activity by Whirlpool and Sears to keep Oreck from selling more vacuum cleaners and to destroy Oreck's competitive activities. Throughout the trial, Whirlpool's refusal to procure Canadian Standards Association approval for the vacuum cleaners Oreck desired to sell in Canada was characterized as a major part of the alleged Whirlpool/Sears conspiracy to violate the antitrust laws.

standard. *Packard Motor Car Co. v. Webster Motor Car Co.* [1957 TRADE CASES ¶ 68,682], 243 F. 2d 418 (D.C. Cir.), cert. denied, 355 U.S. 822 (1957); see also, *United States v. Arnold, Schwinn & Co.* [1967 TRADE CASES ¶ 72,126], 388 U.S. 365 (1967), overruled on other grounds, *Continental T. V., Inc. v. GTE Sylvania, Inc.* [1977-1 TRADE CASES ¶ 61,488], 433 U.S. 36 (1977); *Quality Mercury, Inc. v. Ford Motor Co.* [1976-2 TRADE CASES ¶ 61,086], 542 F. 2d 466 (8th Cir. 1976), cert. denied *sub nom. Prestige Lincoln-Mercury, Inc. v. Quality Mercury, Inc.*, 433 U.S. 914 (1977); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.* [1969 TRADE CASES ¶ 72,914], 416 F. 2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); *Bay City-Abraham Bros., Inc. v. Estee Lauder, Inc.* [1974-1 TRADE CASES ¶ 75,095], 375 F. Supp. 1206 (S. D .N. Y. 1974). On the instant reconsideration *en banc*, the issue is whether the *per se* standard, under which the trial judge charged the jury, was appropriate in light of the nature of the alleged Whirlpool/Sears agreement.

[*Price Competition; Boycott*]

Oreck's argument that the district court was correct in instructing the jury to apply the *per se* standard in this case, rests principally on two assertions: first, that Whirlpool's decision not to renew Oreck's distributorship was motivated by a desire to eliminate the price competition which Oreck was offering to Sears; and second, that this effort by Sears and Whirlpool to restrain competition constituted a group boycott expressly forbidden by the holdings of the United States Supreme Court in *United States v. General Motors Corp.* [1966 TRADE CASES ¶ 71,750], 384 U.S. 127 (1966); and *Klor's, Inc. v. Broadway-Hale Stores, Inc.* [1959 TRADE CASES ¶ 69,316], 359 U.S. 207 (1959).

With regard to the first of these points, it is undisputed that, at all times relevant, Sears was selling its "Kenmore" vacuum cleaners at prices *below* those charged by Oreck for comparable "Whirlpool" models. The complaint did not

allege, the evidence at the trial did not show, and counsel in summation did not argue, that Whirlpool was attempting to maintain high resale prices for its products by conspiring with its distributors or that its actions toward Oreck were an effort to chastise a dealer for refusing to cooperate in a scheme to fix or maintain prices. Cf. *United States v. Parke, Davis & Co.* [1960 TRADE CASES ¶ 69,611], 362 U.S. 29 (1960). The contracts entered into by Oreck and Whirlpool in 1963 and 1968 clearly stated that Oreck had the sole right to determine its selling prices.

[*Edge Effect*]

Oreck concedes that there was no Sears/Whirlpool agreement to fix prices, but argues that the elimination of its distributorship amounted to tampering with the price structure for vacuum cleaners, equally a *per se* violation.[5] See, *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U.S. 150, 221 (1940). In its brief on rehearing *en banc*, Oreck refers to a so-called "edge effect," that is, that by continuing to lower its prices and thereby come closer to those of Sears, Oreck's price operated as a ceiling against any increases by Sears. Cf. *United States v. Penn-Olin Chemical Company* [1964 TRADE CASES ¶ 71,147], 378 U.S. 158 at 173-74 (1964); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division [II]*, 75 Yale L. J. 373, 405-410 (1966). This claim

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[5] Oreck introduced no evidence at trial to show that the purpose of Whirlpool's refusal to renew Oreck's distributorship was to give Sears the power to maintain the prices of its "Kenmore" machines at an artificially high level. Cf. *United States v. Socony-Vacuum Oil Co.* [1940-1943 TRADE CASES ¶ 56,031], 310 U. S. 150, 224-26 n. 59 (1940). Neither did Oreck submit evidence to show that Whirlpool machines had a sufficient share of the vacuum cleaner market to permit any of its dealers to exploit a dealer monopoly without feeling the pinch of interbrand competition. See the Supreme Court, 1976 Term, 91 Harv. L. Rev. 70, 237 n. 57 (1977). It appears from the record that there was effective competition in the vacuum cleaner business at the manufacturer level. When in-

is unavailing in the present posture of this case. Because of the trial judge's incorrect instructions to the jury, it cannot be said that the issue of whether Oreck's distributorship was allowed to lapse in order to protect Sears from price competition was fairly submitted to the jury or decided by its verdict. Rather, because the trial judge failed to instruct the jury that it must find that the purpose or the effect of these agreements was to enable Sears to raise or to maintain its prices for "Kenmore" vacuum cleaners, the jury's verdict that Sears and Whirlpool violated § 1 of the Sherman Act is of no effect.

[*Boycott*]

Oreck alleged that its cancellation, by agreement of Whirlpool and Sears, was a "group boycott" under the rule of *Klor's Inc. v. Broadway-Hale Stores, Inc., supra,* and of *United States v. General Motors Corp., supra,* which treat such behavior as a *per se* violation of § 1 of the Sherman Act. This case, however, cannot be fitted into the category of group boycott cases. "While the boycott concept is infinitely expandable, the *per se* doctrine ought not to be." Sullivan, *Antitrust* 256 (1977), quoted in *Drayer v. Krasner,* — F. 2d — (2d Cir. Jan. 25, 1978), slip op. at

terbrand competition exists, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product. See *Continental T. V., Inc. v. GTE Sylvania, Inc., supra,* at 52 n. 19. In order to prove a violation of § 1 of the Sherman Act, Oreck would have had to show that Whirlpool's agreement with Sears to eliminate Oreck's competition either promoted a Whirlpool monopoly in the vacuum cleaner industry, see *Quality Mercury, Inc. v. Ford Motor Co., supra,* at 470; *Fleischmann Distilling Corp. v. Distillers Co. Ltd.* [1975-1 TRADE CASES ¶ 60,337], 395 F. Supp. 221 (S. D. N. Y. 1975); or gave Sears a market position from which it could raise retail prices even in the face of interbrand competition. See, ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition (1977), at 93 n. 380. The Whirlpool/ Sears agreement should, therefore, have been examined under the rule of reason standard.

1253, 1265. It is important to distinguish between "horizontal" restraints, *i.e.* agreements between competitors at the same level of market structure, and "vertical" restraints, *i.e.* combinations of persons at different levels of the market structure, such as manufacturers and distributors. See *United States v. Topco Associates* [1972 TRADE CASES ¶ 73,904], 405 U.S. 596, 608 (1972). Horizontal restraints alone have been characterized as "naked restraints of trade with no purpose except stifling competition," *White Motor Co. v. United States* [1963 TRADE CASES ¶ 70,679], 372 U.S. 253, 263 (1963); and, therefore, *per se* violations of the Sherman Act. On the other hand, while vertical restrictions may reduce intrabrand competition by limiting the number of sellers of a particular product, competing for a given group of buyers, they also promote interbrand competition by allowing a manufacturer to achieve certain efficiencies in the distribution of its products, see *Continental T. V., Inc. v. GTE Sylvania, Inc., supra,* at 54. They are therefore, to be examined under the *rule of reason* standard. See Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977,* 77 Colum. L. Rev. 979 at 985-87 (1977).

In *Klor's,* the Supreme Court specifically noted that "this is not a case of . . . a manufacturer and . . . [its] dealer agreeing to an exclusive distributorship," 359 U.S. at 212. The present case, involving as it does an alleged agreement between a single manufacturer and a single dealer, is, in essence, an exclusive distributorship controversy, and the "group boycott" doctrine, is, therefore, not applicable. Because Sears is a large company presumably selling a large number of vacuum cleaners does not, *ipso facto,* convert this case into a horizontal conspiracy warranting *per se* treatment.[8] Cf. *Continental T. V., Inc. v. GTE Sylvania, Inc., supra,* at 58 n. 28.

[8] Oreck seeks to distinguish the line of cases upholding the legality of agreements by which a manufacturer substitutes one exclusive distributor for another or terminates a distributor in order

[*Legitimate Business Concerns*]

Moreover, in his instructions to the jury, the trial judge failed to marshal any of the evidence presented by Whirlpool to show that its refusal to renew Oreck's distributor-

to afford another exclusive selling rights, see, *e.g.*, *Quality Mercury, Inc.* v. *Ford Motor Co., supra; Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc.* [1972 TRADE CASES ¶ 73,918], 459 F. 2d 138 (6th Cir. 1972); *Alpha Distributing Co. of Calif. v. Jack Daniel Distillery* [1972 TRADE CASES ¶ 73,798], 454 F. 2d 442 (9th Cir. 1972), cert. denied, 419 U.S. 842 (1974); *Packard Motor Car Co. v. Webster Motor Car Co., supra;* on the ground that Sears did not replace Oreck as the distributor of "Whirlpool" vacuum cleaners; and, therefore, competition of both an interbrand and intrabrand nature was eliminated.

While it is true that, because of its unique facts, this case does not fit exactly into the dealer substitution line of cases, appellee's argument does not persuade us that it therefore comes within the rule of *per se* illegality. It may be argued that there were alternative sources of supply available to Oreck and that the net effect of Whirlpool's decision to allow Oreck's distributorship to lapse was *to add* an interbrand competitor to Whirlpool-made machines in the upright vacuum cleaner market. Moreover, it appears from the record that, while Sears sold several models of Whirlpool-made vacuum cleaners under its "Kenmore" label, Oreck was allowed to market only one model under the terms of the 1968 agreement, thereby reducing the potential for intrabrand competition in Whirlpool-made machines In the absence of a showing of an anticompetitive purpose or effect, the fact that Sears may have asked to be made the sole distributor of a certain line of products (in this case, *Whirlpool-made* vacuum cleaners), does not render Whirlpool's subsequent action in refusing to renew Oreck's distributorship illegal. Cf. *Federal Trade Commission v. Raymond Bros.-Clark Co.*, 263 U. S. 565 (1924); *Packard Motor Car Co. v. Webster Motor Car Co., supra.*

The rule of reason provides a more discriminating way of differentiating true exclusive dealerships from two-firm vertical combinations to exclude a distributor from supply. Although Oreck asserts that Whirlpool's refusal to renew its distributorship was against Whirlpool's own economic interests, the trial court's instructions to the jury, under the *per se* rule, did not require the jury to balance the anticompetitive evils and pro-competitive vir-

ship was motivated by legitimate business concerns[7] and that its actions were consistent with the terms of the 1968 contract. It is the contractual nature of the dealings between Oreck and Whirlpool which distinguish this case from the holding of *United States v. General Motors Corp., supra,* relied upon by Oreck. In *General Motors,* the Court focused on the *extra*-contractual and price-fixing aspects of General Motors' activities in eliciting from dealers in the Los Angeles area agreements, substantially interrelated and interdependent, that none of them would do business with price discounters. 384 U.S. at 144. The Court pointed out that what resulted from the activities of General Motors was "a fabric interwoven by many strands of joint action to eliminate the discounters from participation in the market, to inhibit the free choice of franchised dealers to select their own methods of trade and to provide multilateral surveillance and enforcement," *id.* at 144; and that these activities could hardly be described as "unilateral" or merely "parallel." *Id.* at 145. It was this same concerted action by

tues of the alleged vertical Sears/Whirlpool agreement, as would have been done under the rule of reason. See *Continental T. V., Inc. v. GTE Sylvania, Inc., supra,* at 57 n. 27; Handler Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977, 77 Colum. L. Rev. 979 at 983 (1977). "*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive," *Continental T. V., Inc. v. GTE Sylvania, Inc., supra,* at 49-50; and where the conduct involved is an agreement between a single manufacturer and a single distributor which results in a sole distributorship for the manufacturer's products, a careful inquiry into the business justifications for the agreement is required.

[7] The evidence presented at trial by both parties revealed several instances of Oreck's alleged disregard for the terms of its contract, *e.g.*, refusal to modify advertising campaigns in accordance with Whirlpool's wishes, sales to private label customers, and failure to abide by the original marketing strategy of distribution to major retail accounts; anyone of which could have justified Whirlpool's refusal to renew Oreck's distributorship. In addition, the 1968 contract itself contained no provision for renewal.

businessmen to boycott other traders and thereby deprive them of access to all sources of merchandise which they wished to sell to the public, which led to the results reached in *United States v. Parke, Davis & Co., supra;* and *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra. Cf. Beckman v. Walter Kidde & Company* [1970 TRADE CASES ¶ 73,347], 316 F. Supp. 1321, 1327 (E. D. N. Y. 1970), *aff'd* [1971 TRADE CASES ¶ 73,768], 451 F. 2d 593 (2d Cir. 1971), cert. denied, 408 U.S. 922 (1972).

[*Contractual Rights*]

What is crucial here is to consider those actions which General Motors could have taken, but did not, to discourage the sale of cars to discounters, which the Court characterized as being "wholly unilateral conduct, the validity of which under the antitrust laws was assumed, without being decided, in *Parke, Davis, supra.*" *United States v. General Motors, supra,* at 144. After describing the efforts of the Losor Chevrolet Dealers Association to enlist the aid of General Motors, the meetings between General Motors personnel and local dealers at which General Motors elicited from each dealer a promise not to do business with the discounters, and the collaboration among the dealers and with General Motors to enforce these promises, the Court went on to state,

> Nor did General Motors confine its activities to the *contractual boundaries* of its relationships with individual dealers. As the court found (Finding 39), General Motors at no time announced that it would terminate the franchise of any dealer which furnished cars to the discounters. The evidence indicates that it had no intention of acting in this *unilateral fashion.* On the contrary, overriding corporate policy with respect to proper dealer relations dissuaded General Motors from engaging in this sort of *wholly unilateral conduct,* the validity of which under the antitrust laws was assumed, without being decided, in *Parke, Davis, supra.* (Emphasis added and footnotes omitted.) 384 U.S. at 143-144.

The General Motors Dealer Selling Agreement provided that a dealer's franchise could be terminated if the dealer attempted to establish a second and unauthorized sales outlet or location. Without deciding the question, the Court indicated that had General Motors considered that the conduct of a dealer selling to price discounters violated the terms of the Dealer Selling Agreement, it could lawfully have terminated the franchise. The Court nowhere suggests that action by General Motors in accordance with this contract would have been any less unilateral, or any less lawful, because it was taken in response to complaints by competing dealers. Cf. *Federal Trade Commission v. Raymond Bros.-Clark Company,* 263 U.S. 565 (1924). Unlike *General Motors,* the parties in this case introduced no proof that Whirlpool took any action that was not in accord with the terms of its 1968 contract. Whirlpool contends that Oreck was fully aware that its distributorship would cease in December, 1971, regardless of whether or not its efforts to compete against Sears and other vacuum cleaner dealers were successful. The principle that unilateral refusals to deal do not *per se* suppress competition is not altered by the fact that the cut-off distributor has been a "successful dealer" or that its business is damaged. See *Bay City-Abraham Bros, Inc. v. Estee Lauder, Inc., supra; Top-All Varieties, Inc.* v. *Hallmark Cards, Inc.* [1969 TRADE CASES ¶ 72,850], 301 F. Supp. 703 (S. D. N. Y. 1969).

And yet, the trial court made no attempt to balance its charge on the effect of the alleged Whirlpool/Sears conspiracy with a reference to the evidence introduced at trial that Whirlpool's decision not to renew Oreck's distributorship was an exercise of its contractual rights. It has always been the prerogative of a manufacturer to decide with whom it will deal. See *United States v. Colgate & Co.,* 250 U.S. 300 (1919). Any alleged inducements by Sears to

Whirlpool to allow the contract with Oreck to expire may have amounted to tortious interference; but, without some further showing that from this course of conduct there was an anticompetitive effect in the vacuum cleaner industry as a whole, it is inconsistent with the sanctity of contractual arrangements to allow the antitrust laws to inject a provision into the agreement which would require Whirlpool to renew Oreck's distributorship for as long as it is able to compete successfully with Sears. In this case, therefore, something more than an agreement between Whirlpool and Sears to eliminate Oreck must be shown. The agreement becomes violative of § 1 of the Sherman Act only if it is *anticompetitive in purpose or effect*—in sum, it must be tested by the rule of reason. Without any consideration of the anticompetitive purpose or effect, arbitrarily seeking to protect Oreck simply because Whirlpool refused to renew a contract with Oreck which had terminated by its own terms, even though this refusal was in whole or in part, due to persuasion by Sears, disregards the well established rule that "the antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors* . . .'"

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. [1977-1 TRADE CASES ¶ 61,255], 429 U.S. 477, 488 (1977). (Emphasis in original.)

The judgment of the district court, based as it is on a finding of liability on the part of Whirlpool and Sears, is reversed and the case is remanded for a new trial. In so doing, we express no opinion as to the correctness of those portions of the trial court's instructions dealing with the formulation of damages.

[Dissenting Opinion]

MANSFIELD, Cir. J., dissenting in an opinion in which Judge Feinberg concurs:

This antitrust appeal turns on two major interlocking issues, one factual and the other legal: (1) Did Whirlpool

and Sears combine and conspire to oust Oreck as a competitor of Sears in the sale of Whirlpool-made vacuum cleaners? (2) If so, should the conspiracy be treated as *per se* illegal? In my view both questions must be answered affirmatively. Therefore, I dissent.

The majority opinion is based on certain materially mistaken premises. It assumes (1) that the complaint charges only a general conspiracy "to exclude Oreck from the vacuum cleaner market in the United States and Canada" (Maj. Opin. p. 6690, *supra*), (2) that Oreck's case rested solely upon Whirlpool's failure to renew its agreement for distributorship of Whirlpool vacuum cleaners and parts, possibly as the result of "inducements by Sears" which "may have amounted to tortious interference" (Maj. Opin. p. 6701), and (3) that the jury credited the testimony of one or two Whirlpool officers regarding Whirlpool's reasons for termination of its agreement with Oreck rather than the evidence offered by Oreck (Maj. Opin. p. 6690; n. 2).

Only on the basis of these erroneous assumptions is the majority able to conclude that the termination of the Whirlpool-Oreck distributorship agreement did not constitute a *per se* violation of § 1 of the Sherman Act, and that there could be no violation of that Act in the absence of proof of a restraint of "trade unreasonably in the vacuum cleaner industry in the United States and/or Canada." However, when the case is viewed in the light of (1) the issues framed by the pleadings, (2) the evidence presented at trial (including the inferences which the jury could reasonably have drawn from that evidence), and (3) the applicable principles of antitrust law as charged by the trial judge, the reversal is unwarranted.

Turning first to the complaint, the First Claim alleges essentially a conspiracy between Whirlpool and Sears to restrain Oreck from competing against Sears in the sale of Whirlpool-made vacuum cleaners, attachments and parts.

It is claimed that pursuant to a written Whirlpool-Oreck distributorship agreement dated August 7, 1963, Oreck invested substantial funds, time and effort in building up a successful sales and service organization for the distribution of Whirlpool vacuum cleaners and that Oreck's success enabled it "to compete seriously" with Sears, the preexisting and only other distributor of Whirlpool-made vacuum cleaners, which sold the cleaners under the "Kenmore" label. (Compl. ¶ 14). The complaint further alleges that as a result of Oreck's successful competition against Sears, Whirlpool was induced by Sears, its major distributor, to "eliminate any serious competition to Sears, Roebuck from Oreck" (¶ 15) and to combine and conspire with Sears "to deprive Oreck of its market for the sale of vacuum cleaners, attachments and parts under the Whirlpool name and label" (¶ 25). The conspiracy was allegedly carried out by (1) forcing Oreck in 1968 to reduce its distributorship to "two Whirlpool products, one vacuum cleaner and one set of attachments to a different vacuum cleaner," (2) limiting or cutting off from Oreck replacement parts, tools, drawings, improvements and modifications for Whirlpool vacuum cleaners, and (3) forcing or persuading suppliers not to furnish vacuum cleaner components to Oreck, all "with the intent and effect of foreclosing Oreck from numerous customers and potential customers and reducing Oreck's competition with Sears, Roebuck." (¶ 21). The purpose and effect of the alleged conspiracy is then stated as follows:

> 25. The purpose and effect of such contracts, combinations or conspiracies, and each of them, have been to deprive Oreck of *its market for the sale of vacuum cleaners, attachments and parts under the Whirlpool name and label,* and Oreck has substantially lost such market as a result of the actions referred to above.
>
> 26. The purpose and effect of such contracts, combinations or conspiracies, and each of them, have *also* been substantially to exclude Oreck from the market for vacuum cleaners, attachments and parts in the United States and its possessions, and to lessen competition in such market. (Emphasis added).

Thus, although the complaint includes allegations of restraint of trade in vacuum cleaners generally in the United States and Canada, it charges primarily a conspiracy to deprive Oreck of the sale of Whirlpool cleaners in competition with Sears. The case was tried on the latter basis and if the plaintiff succeeded in proving a conspiracy limited to the objective alleged in ¶ 25, it would be entitled to recover without proving the broader claim in ¶ 26, that it was excluded from the sale of vacuum cleaners of any kind in the United States. *United States v. General Motors* [1966 TRADE CASES ¶ 71,750], 384 U. S. 127 (1966); *Klor's, Inc. v. Broadway-Hale Stories* [1959 TRADE CASES ¶ 69,316], 359 U. S. 207 (1959); *Silver v. N. Y. Stock Exchange* [1963 TRADE CASES ¶ 70,787], 373 U. S. 341, 348, n. 5 (1963).

The Second Claim of the complaint (the only other pertinent claim for present purposes) adds to the foregoing allegations the charge that Sears and Whirlpool also conspired "to prevent Oreck from selling vacuum cleaners and other Whirlpool products in Canada."[1]

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[1] Insofar as the claim alleged in Count Two was presented to the jury as charging the defendants with an unlawful vertical location restriction, I agree with the majority that *Continental T. V., Inc. v. GTE Sylvania, Inc.* [1977-1 TRADE CASES ¶ 61,488], 433 U. S. 36 (1977), which was not decided until almost a year after Judge Owen instructed the jury in this case, now requires trial courts to make a preliminary determination of whether a particular challenged restraint warrants *per se* treatment or should be judged according to the rule of reason.

Judge Owen did not make this preliminary determination. However, I do not agree with the majority that Judge Owen's charge on this point necessarily prejudiced the jury's consideration of the evidence relating to Count One, since the jury verdict on that Count was supported by abundant evidence independent of the proof concerning Whirlpool's resistance to Oreck's desire to enter the Canadian market.

From the outset it was recognized that Oreck could not establish an unreasonable restraint in the distribution of vacuum cleaners generally in the United States, since Whirlpool cleaners represent but a small percentage of the entire market. As a practical matter, therefore, the issue tried was whether Sears and Whirlpool had combined to restrain Oreck's competition against Sears by precluding Oreck from selling Whirlpool-made vacuum cleaners, attachments and parts. The record, which must at this stage be viewed most favorably to Oreck, *Continental Ore Co. v. Union Carbide & Carbon Corp.* [1962 TRADE CASES ¶ 70,361], 370 U. S. 690 (1962), discloses more than ample evidence to establish this specific and limited conspiracy. Since 1925 Sears has been the principal distributor of Whirlpool products, currently purchasing more than two-thirds of Whirlpool's total appliance production and, at the time of the events here involved, more than 90% of Whirlpool's vacuum cleaner output for resale under Sears' "Kenmore" label. In addition Sears, beginning in 1925, purchased a substantial block of Whirlpool's common stock and by 1960 became its largest single shareholder, owning 251,192 shares and usually electing one or more of its executives to Whirlpool's board of directors. Senior officers of Sears sometimes became Whirlpool executives. Sears, therefore, has been in a position to exercise considerable leverage over Whirlpool's sales and distribution policies and decisons.

Prior to the formation of Oreck in 1963, Whirlpool had periodically attempted to broaden the sales of its vacuum cleaners by marketing them under its own brand name, but had found that its existing distribution network was inadequate and that Sears' sales of Whirlpool-manufactured vacuum cleaners at high retail prices posed a barrier to Whirlpool's entry into price competition against other brands as long as its relationship with Sears deterred it from competing against Sears in the sale of Whirlpool-made machines. As a result, Whirlpool in 1961 discontinued efforts to sell its products independently under its own name and H. Thomas Stroop, a Whirlpool executive, prepared a report

entitled "Appraisal of Vacuum Cleaner Business—RCA Whirlpool." He concluded that:

> Unlike other appliances, Sears sells their [vacuum] cleaners for as high or higher prices than major brand competition. . . .
>
> Sears becomes very unhappy if RCA Whirlpool product is retailed for less than Sears product manufactured by Whirlpool. For this reason, we understand that it has been decided that the RCA Whirlpool brand should have retail prices comparable to Sears.
>
> Our challenge then . . . "Can we sell cleaners in volume at high retail prices . . . and if so how?" (Pl. Ex. 160.)

Thereafter, until the events giving rise to this case, Whirlpool-made vacuum cleaners were sold to the public only by Sears.

In April, 1963, Whirlpool's interest in selling its vacuum cleaners under its own brand name was revived. Jack Sparks, Vice President of Whirlpool, approached David Oreck, who prior to 1961 had been in charge of Whirlpool vacuum cleaner sales for "Bruno New York" and had been the most successful distributor of Whirlpool vacuum cleaners under its own brand name before Whirlpool discontinued such sales. Sparks and Oreck agreed that the newly-formed Oreck Corporation, plaintiff-appellee, would function as the exclusive United States distributor of Whirlpool brand vacuum cleaners. Sparks advised Oreck that he was "not to conflict with Sears, Roebuck on price" and an internal Whirlpool letter confirmed that Oreck's prices would "emphasize specialty [i. e., high-priced] selling."

Oreck soon found that it could operate profitably only by selling Whirlpool-made vacuum cleaners through direct mail or institutional supply houses, which would, by reducing or eliminating the middleman's mark-up, enable Oreck to sell competitively. Accordingly, in 1967 Oreck began a large-scale mail solicitation campaign which dramat-

ically increased its sales of Whirlpool machines from a low in 1967 of 8,384 units to an all-time high of 78,203 units in 1971, the year Whirlpool terminated its distributorship. Oreck planned to realize its profits principally from the sale of dust bags and accessories over the 10-15 year life of the product. Despite the prospects for increased small order sales, which actually developed, three Whirlpool executives —Jack Sparks, Sol Sweet and John Payne, Whirlpool's primary contact with Oreck—all expressed disapproval of Oreck's mail order campaign, Payne advising Oreck that Whirlpool's unhappiness was attributable to the company's "other customer" (Sears), which did not like the mail solicitation. Indeed, Sid Boyar, a Sears vice-president and director who was also a director of Whirlpool, forwarded to Whirlpool an Oreck mail solicitation for sale of Whirlpool machines, with a note advising that this "type of selling gave Whirlpool a bad name." Payne also told Oreck that the "other customer [Sears] got to the head of the company [Whirlpool]." As a mail order house, Sears might be adversely affected by Oreck's solicitation of mail order business for vacuum cleaners made by the same company (Whirlpool), which were similar in appearance and design to those sold by Sears.[2] Moreover, although Oreck had originally concentrated on sale of the higher-priced "top-of-the-line" Whirlpool machines, after it shifted to mail order sales and sales to institutional supply houses, its prices for the Whirlpool upright units (which it sold in these markets) were lowered.

That a Whirlpool-Sears combination had been formed to stop Oreck's competition against Sears was further evidenced by events during the preceding year, 1966, when David Oreck sought to obtain Whirlpool's approval of Oreck's plan to market in Canada, where Sears operated under the name of Simpson-Sears Ltd. Whirlpool refused

[2] Indeed, despite minor differences, the machines sold by Oreck were so similar to those sold by Sears that they were characterized by an expert as "the same."

to make the minor changes in the Whirlpool vacuum cleaner necessary to conform to Canadian Standard Association requirements, as Whirlpool had done for Sears, and Payne later wired Oreck that it could not market in Canada because Whirlpool could not "obtain a waiver to the current franchise," meaning approval by Sears.

By 1968 the Whirlpool-Sears combination was putting pressure on Oreck to force it to lessen its competition against Sears. In that year Whirlpool refused to manufacture private label vacuum cleaners for certain of Oreck's large customers, and Payne attributed the refusal to "objections from our customer . . .", which could be interpreted by the jury as obviously referring to Whirlpool's only other customer, Sears. When Oreck persisted, Payne eventually advised him that "another vacum cleaner customer" had informed Whirlpool that "they are not interested in having another competitor in the vacuum cleaner business." In 1969 and 1970, Whirlpool refused to make minor changes in Oreck's shipping carton to meet parcel post requirements and thereby avoid a penalty charge, even though Whirlpool had provided Sears with an acceptable box for its mail orders. Payne, who handled the matter, attributed the refusal not to engineering difficulties but to a "corporate" decision.

On December 31, 1971, despite Oreck's highest sales level since it had begun selling Whirlpool vacuum cleaners, Whirlpool terminated the Oreck distributorship. Whirlpool witnesses conceded at trial that Oreck was "doing a nice job, no question about that" and "we had no argument with the amounts he was selling." Yet, immediately following the termination, Whirlpool refused to sell Oreck 30,000 units in inventory at $30 each on a cash basis but sold them instead to third parties at $15 per unit.

The foregoing, together with other evidence and witnesses viewed by the jury, supported the jury's conclusion that Whirlpool terminated Oreck as the result of the combined efforts of Sears and Whirlpool to put an end to Or-

eck's competition against Sears in the sale of Whirlpool machines, including mail-order solicitation, to which Sears objected because of the possible adverse effect on its sale of Whirlpool vacuum cleaners under its own label in the United States and Canada. No substantial evidence was offered to show that Oreck was terminated for some possibly lawful reason, such as failure to increase Whirlpool sales or Whirlpool's desire to protect its trade name, other than testimony of Jack D. Sparks and John Payne that Oreck had failed to market to "major accounts." This purported rationale for the termination was understandably rejected by the jury in view of the tremendous increase in Oreck's sales of Whirlpool cleaners from 1967 to 1971.

With the foregoing allegations and evidence before him, the trial judge instructed the jury

> [T]hat in order to recover under Count I Oreck has the burden of proving each of the following propositions:
>
> That Whirlpool and Sears combined or conspired to exclude Oreck from the market for Whirlpool vacuum cleaners, *or* from the vacum cleaner market generally in the United States and its possessions and to lessen the competition in either of these markets.
>
> Two. That as a result of said combination or conspiracy Oreck was partially or wholly excluded from the vacuum cleaner market as I have described above.
>
> Three. That as a proximate result of said exclusion Oreck in fact suffered damage. (Emphasis supplied).[3]

[3] It is noteworthy that no objection was made to these jury instructions at trial, nor did the defendants claim that the charge was erroneous in their appeal from the jury's verdict.

The majority contends that Judge Owen's charge was defective in that it allowed the jury to find antitrust liability on evidence that amounted to no more than "a perfectly legal exclusive distributorship." (Maj. Opin. p. 5). Judge Owen properly instructed the jury on this point. His charge states:

"The manufacturer may discontinue an exclusive distributorship or may refuse to renew an exclusive distributorship for business reasons which are sufficient to the manufacturer alone and any adverse effect such a decision may have upon the business of the distributor is immaterial ***in the absence of any arrangement or conspiracy restraining trade or competition.***" (Tr. 1839) (emphasis supplied).

On the evidence and this instruction the jury could have found that Oreck had by a preponderance of the evidence established the more specific and limited conspiracy alleged in its First Claim, namely, a combination between Whirlpool and Sears to eliminate Oreck as a competitor of Sears in the distribution of Whirlpool vacuum cleaners, parts and attachments. Indeed, the majority virtually concedes this, stating:

> Under such instructions, the jury could simply have found an agreement by Sears and Whirlpool to exclude Oreck from the sale of Whirlpool vaccum cleaners and, *on that basis,* have found them guilty (as it in fact did) of a *per se* violation of § 1 of the Sherman Act. . . . On the instant reconsideration *en banc,* the issue is whether the *per se* standard, under which the trial judge charged the jury, was appropriate in light of the nature of the alleged Whirlpool/Sears agreement. (Maj. Opin. pp. 6691-93) (Emphasis in original).

Accepting the legal issue as framed by the majority, the answer is furnished in clear and unmistakable terms by a long line of Supreme Court decisions consistently holding that where two or more competitors agree to cut off supplies to a third, such a combination or agreement to boycott is sufficiently pernicious in its purpose and effect to be unreasonable *per se* and hence illegal without the necessity of inquiring into the precise economic harm in the market caused by the agreement or into the amount of commerce affected. *United States v. General Motors* [1966 TRADE

CASES ¶ 71,750], 384 U. S. 127, 145-46 (1966) (agreement between GM and its Chevrolet dealers to cut off supply to price-discounters selling Chevrolets); *Klor's, Inc. v. Broadway-Hale Stores* [1959 TRADE CASES ¶ 69,316], 359 U.S. 207 (1959) (conspiracy between one merchant and suppliers to deprive competing merchants of goods); *United States v. Topco Associates, Inc.* [1972 TRADE CASES ¶ 73,904], 405 U. S. 596 (1972); *Northern Pac. R. Co. v. United States* [1958 TRADE CASES ¶ 68,961], 356 U. S. 1 (1958); *Fashion Originators Guild of America, Inc. v. FTC* [1940-1943 TRADE CASES ¶ 56,101], 312 U. S. 457 (1941). Such a combination "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy," *Klor's supra,* 359 U. S. at 213 (footnote omitted).

> [W]here businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct. See Barber, Refusals To Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 872-885 (1955). Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed—as in *Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n, supra,* at 468. *United States v. General Motors, supra,* 384 U. S. at 146-47.

The present case is governed by these basic principles. The jury found that Whirlpool, a large manufacturer of appliances, including vacuum cleaners, combined with Sears, Roebuck, a merchandising giant that depended on mail order business and had for 40-odd years distributed the lion's share of Whirlpool's entire output, to stop Oreck, the only other distributor of Whirlpool-made vacuum cleaners, from competing against Sears in the sale of Whirlpool-made machines.

Before Oreck was terminated by the Sears-Whirlpool combination as a competing distributor, the public had the benefit of Oreck's competition, including price competition, in the marketing of Whirlpool cleaners, the sales of which had been dramatically increased by Oreck from 8,384 units to 78,203 units in the preceding four years, resulting in profits to Whirlpool and Oreck.[4] After the termination the public could buy Whirlpool machines only from Sears at such prices as Sears might decide, unaffected by any Oreck competition.

The majority's legalization of this Whirlpool-Sears conspiracy on the theory that "something more than an agreement between Whirlpool and Sears to eliminate Oreck must be shown" (Maj. Opin. p. 6701), and that Whirlpool could lawfully have accomplished the same result by unilaterally

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[4] Although my view of this case does not rest on Oreck's ability to compete with Sears pricewise, one aspect of the issue of price competition merits discussion. Oreck's initial brief on appeal strongly suggested in numerous places that the Sears-Whirlpool conspiracy was partly motivated by Sears' desire to eliminate Oreck because of the competition on prices that Oreck provided. These suggestions were not disputed by the defendants until the *en banc* briefs were filed.

My panel dissent mistakenly referred to Oreck's prices for Whirlpool-made vacuum cleaners as "lower" than the Sears prices for its Kenmore version of the same cleaners. The important point, however, is not which cleaners were higher-priced, but whether Sears encountered serious competition from Oreck that motivated it to prevail upon Whirlpool to terminate Oreck. The evidence showed that Oreck was a vigorous competitor, especially in the last years of its distributorship, when its sales rose dramatically. Also, it is undisputed that by 1970, 90% of Oreck's sales were from mail order solicitations, a traditional preserve of Sears.

exercising its contract right to terminate or not to renew, simply is unsupportable, either by logic or by precedent. Had Whirlpool not agreed with Sears to oust Oreck, as the jury found, Whirlpool not only could have, but probably would have, continued to distribute its product through Oreck, in view of the latter's outstanding success in selling Whirlpool cleaners during the four years immediately preceding the 1971 termination. As the jury found, the cutoff was directly attributable to the Sears-Whirlpool combination, not to any unilateral exercise by Whirlpool of its rights under its distribution contract with Oreck. The existence of a contract right to terminate Oreck does not create a mantle of protection against an anticompetitive agreement between a manufacturer and a distributor to terminate the distributor's sole competitor.

No one questions the right of a manufacturer unilaterally to terminate a distributorship, whether it be to maximize profits, improve a distribution system, or for some other legitimate reason, see, e.g., *United States v. Colgate*, 250 U.S. 300 (1919), and a manufacturer is not precluded from acting on his own to substitute one exclusive distributor for another. *Alpha Distributing Co. v. Jack Daniels Distillery* [1972 TRADE CASES ¶ 73,798], 454 F. 2d 442, 452 (9th Cir. 1972); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors Ltd.* [1969 TRADE CASES ¶ 72,914], 416 F. 2d 71, 76 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); *Packard Motor Car Co. v. Webster Motor Car Co.* [1957 TRADE CASES ¶ 68,682], 243 F. 2d 418 (D. C. Cir.), cert. denied, 355 U. S. 822 (1957); *Elder-Beerman Stores Corp. v. Federated Department Stores, Inc.* [1972 TRADE CASES ¶ 73,918], 459 F. 2d 138 (6th Cir. 1972). The jury was so instructed.[5] But when the manufacturer agrees with one or more existing competitors of its distributor to cut off the distributor, as the jury found here, the resulting termination is unlawful, *United States v. General Motors Corp.*,

[5] See note 3, *supra*.

supra; Klor's, Inc. v. Broadway-Hale Stores, supra; E. A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm. [1972 TRADE CASES ¶ 74,125], 467 F. 2d 178, 186-87 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. Pa. L. Rev. 847, 875 (1955), and cannot be saved by using an otherwise lawful means of termination to carry out an anticompetitive agreement. See *Poller v. Columbia Broadcasting System* [1962 TRADE CASES ¶ 70,228], 368 U.S. 464, 468-69 (1962).

These basic principles were accepted at trial by Whirlpool's counsel in a recorded exchange with Judge Owen regarding the instructions to be given by him to the jury:

> The Court: I understand that, but it seems to me that if the jury were to conclude that Sears and Whirlpool had conspired to terminate Oreck to rid Sears of a competitor, they have gone all the farther that they need to go.
>
> Mr. Turoff [Whirlpool's counsel]: I see now your Honor's argument. I think what you are saying is that if the jury finds that we had a conspiracy for the purpose of getting rid of Oreck, that is an unreasonable restraint of trade. That is, I think, a correct statement of the law.

In view of the jury's finding of just such a conspiracy, no basis exists for Judge Anderson's statement (Maj. Opin. pp. 6700-01) that "Any alleged inducements by Sears to Whirlpool to allow the contract with Oreck to expire" may have amounted merely to "tortious interference," and that it would therefore be "inconsistent with the sanctity of contractual arrangements" to require Whirlpool to renew Oreck's distributorship. The Whirlpool-Sears agreement to "terminate Oreck's to rid Sears of a competitor" was not only a "tortious interference" but also a *per se* unreasonable restraint of competition. *United States v. General*

Motors Corp., supra; Klor's, Inc. v. Broadway-Hale Stores Inc., supra.

Nor can the boycott here be legalized on the technicality that it is "vertical" because only one horizontal competitor, Sears, was a member of the conspiracy. It is the participation of this competitor, incidentally one of the country's merchandising giants, with some 2,800 stores and sales offices, that renders illegal the boycott of Oreck by establishing that the Whirlpool-Sears agreement was anti-competitive and designed to benefit Sears at the expense of its competitor, Oreck. Once that objective was shown, the number of the conspirators and their posture—whether vertical or horizontal—has no legal significance. See, e.g., *General Motors, supra,* where the boycott depended for its success upon vertical conspiratorial efforts by one manufacturer, as here. Moreover, the harmful effect on the victim of the boycott—in this case Oreck—does not depend on the existence of more than one competitor but upon the anticompetitive agreement between the competitor and the supplier.[6]

Finally, the majority places heavy reliance on *Continental T. V., Inc. v. GTE Sylvania, Inc.* [1977-1 TRADE CASES ¶ 61,488], 433 U.S. 36 (1977), which was decided approximately one year after the jury rendered its verdict in this case. In *Sylvania* the Supreme Court held that the potential harm from nonprice vertical restrictions is insufficient to warrant as a general rule their classification as *per se* illegal, and that the legality of such commercial practices must be judged by a "rule of reason," unless the particular challenged practice is shown to have a "pernicious effect on

[6] As Professor Sullivan observed in his discussion of the *per se* approach to group boycotts, "it is conceivable that only a single firm at the blockaded level [Sears] may succeed in coercing or inducing . . . one important supplier [Whirlpool] . . . from dealing with one or more would-be competitors [Oreck]. . . . Such an arrangement would display all essential elements of a boycott." Sullivan, *Antitrust,* 231, n. 1 (1977).

competition" and to lack "any redeeming virtue." *Northern Pac. R. Co. v. United States* [1958 TRADE CASES § 68,961], 356 U. S. 1, 5 (1958).

While the *Sylvania* holding indicates that the trend in antitrust doctrine may be toward increasing application of the rule of reason over the *per se* approach, the decision is largely irrelevant to this case, which involves a boycott, not a vertical restriction.

Sylvania leaves intact the justification and standard for the creation of *per se* rules, as articulated in *Northern Pacific, supra,* and the boycott in this case meets that standard. No redeeming virtue has been asserted to justify the conspiracy between Whirlpool and Sears to terminate Oreck, as found by the jury; nor has it ever been suggested that benefits to the marketplace will result from this conspiratorial termination. Moreover, the harm to intrabrand competition in the sale of Whirlpool-made vacuum cleaners is both immediate and apparent, with no countervailing stimulation of interbrand competition, the usual saving grace of a vertical restraint.

Until the Supreme Court decides that a boycott ought not to be evaluated according to the *per se* rule, I would hold that a combination or conspiracy of two or more persons or entities to eliminate a competitor is *per se* illegal under § 1 of the Sherman Act. The jury's conclusion that such a conspiracy existed in this case is supported by the evidence. Therefore, I would affirm.